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IN THE

Supreme Court of the United States

STEVEN VANKESTEREN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fourth Amendment protects a landowner from warrantless, prolonged videotaping by an unattended, hidden video camera placed, and set to record, by a trespassing game warden on the landowner's posted, private property.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Steven Vankesteren respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in *United States v. Vankesteren*, No. 08-4110.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is published at 553 F.3d 286. (App. A.) The District Court did not issue a written opinion, though the District Court did affirm the United States Magistrate Judge's denial of Petitioner's motion to suppress in its Final Order, No. 2:07cr153. (App. B.)

JURISDICTION

The final judgment of the court of appeals was entered on January 8, 2009. (App. A.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

In *Oliver v. United States*, 466 U.S. 170 (1984), this Court clarified the open fields doctrine first enunciated in *Hester v. United States*, 265 U.S. 57 (1924). In *Oliver*, this Court held that evidence seized incident to an officer's warrantless entry onto posted, private property does not violate the Fourth Amendment if the Court determines that the property constituted an open field rather than a protected space, such as a house or curtilage. This Court declared that "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." *Oliver*, 466 U.S. at 181.

The Court, however, did not contemplate constant government surveillance or an extended warrantless intrusion in the form of a hidden video camera. This case presents that issue. The Fourth Circuit held that "the protective wall of the Fourth Amendment does not shield appellant from the Commonwealth's

use of hidden, video-recorded surveillance." *United States v. Vankesteren*, 553 F.3d 286, 287 (2009). As modern surveillance technology becomes smaller and more-easily hidden each day, the Fourth Circuit's decision presents an important expansion of the open fields doctrine and a significant erosion of the expectation of privacy doctrine.

1. Steve Garvis, an agent for the Virginia Department of Game and Inland Fisheries ("VDGIF"), believed that Petitioner Steven Vankesteren might be trapping protected birds, based on an anonymous tip that Agent Garvis received in December 2006. In response to the anonymous tip, on December 29, 2006, the agent entered and trespassed onto Petitioner's posted, private property and searched the property without a warrant until he located a large trap that contained two lawfully-trapped pigeons. Agent Garvis believed that this trap could be used for trapping hawks because he had seen a similar trap advertised for that purpose on the Internet. The agent entered the posted, private property at least four more times and never found evidence of any illegal trapping, but he did find evidence of animal carcasses that were lawful to trap and kill. On January 11, 2007, Agent Garvis again entered and trespassed onto Petitioner's posted, private property without a warrant, surreptiously installed a video camera in a hidden location near the trap, and set the video camera to record. The video camera recorded everything within its twelve-by-twelve foot viewfinder whenever activated by both daylight and motion.

After thirteen days of video surveillance, Agent Garvis learned from Special Operations Agent Gene Agnese that the video camera had captured surveil-

lance footage of Petitioner killing two trapped birds. Surveillance footage showed Petitioner killing the first unidentified bird on January 17, 2007. Surveillance footage from January 20, 2007, showed Petitioner removing a bird from the trap and killing it with an axe. After examining the surveillance footage, Agent Garvis identified the second bird as a red-tailed hawk. Agent Agnese opined that the carcasses of both birds were likely near a hedgerow near the trap, and on January 25, 2007, Agent Garvis again entered and trespassed onto Petitioner's posted, private property and found the carcasses in the area near the hidden video camera. Agent Garvis identified both birds as red-tailed hawks.

On January 30, 2007, Petitioner admitted that he had trapped some hawks by accident and had placed their carcasses by the hedgerow near the trap.

2. The federal government charged Petitioner with two counts of taking or possessing a migratory bird without a permit, in violation of 16 U.S.C. § 703 and 50 C.F.R. § 21.11. (App. F.) On August 7, 2007, Petitioner proceeded to trial *pro se* before the Honorable F. Bradford Stillman, United States Magistrate Judge in the United States District Court for the Eastern District of Virginia, Norfolk Division, where he challenged the legality of the government search of his property and asked the court to suppress the evidence obtained from the illegal video recording. (App. C.) The judge refused to suppress the video surveillance footage, citing the open fields doctrine. (App C.) The court framed the entire question as whether the area captured in the surveillance footage was an open field. (App. C at 22.) With no analysis, the court concluded that Petitioner had no reasonable expectation of privacy because the officers who im-

planted the camera had "apparently done [so] on numerous occasions in other circumstances." (App. C at 127.) The court briefly addressed aerial surveillance photography, videotaping in a public, national forest, the plain view doctrine, and good faith on the part of the officers to conclude that the government did not violate the Fourth Amendment by using a hidden video camera in a posted, private open field. (App. C at 127) (referencing *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), and *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999)). After finding Petitioner guilty on both counts, the judge imposed a $500 fine on each count, a $10 special assessment, and a $25 processing fee. (App. C at 133.)

Petitioner appealed the ruling of the magistrate judge to the district court, which found no error. The district court entered a final judgment against Petitioner on December 21, 2007. (App. B.)

3. The Fourth Circuit affirmed the district court's denial of petitioner's suppression motion, as well as Petitioner's conviction and sentence, after reviewing the district court's factual findings for clear error and its legal conclusions *de novo*. Petitioner raised two issues in his appeal to the circuit court: sufficiency of the evidence used to convict him, and the admission of the evidence obtained from the surveillance footage captured by the hidden video camera. After construing the evidence in the light most favorable to the government, the court dispatched the sufficiency argument and affirmed the trial court's decision. *United States v. Vankesteren*, 553 F.3d at 292.

In its review of the trial court's denial of Petitioner's suppression motion, the court gave a serviceable review of the open fields doctrine as established in *Hester* and expanded in *Oliver*. To deter-

mine whether the area at issue in the game warden's trespass constituted an open field, the court applied the four relevant factors established in *United States v. Dunn*, 480 U.S. 294, 301 (1987). *United States v. Vankesteren*, 553 F.3d at 289. The court concluded that Petitioner's field, which was placed under constant surveillance by the hidden video camera, was located over one mile from his home and used for farm-related activities, and thus, was not curtilage. *Id.*

The court then turned to the substantial issue in the case and concluded that because Petitioner had no reasonable expectation of privacy in his open field, he must also have no reasonable expectation of privacy from constant video surveillance in his open field. *Id.* at 290-91. To reach this conclusion, the court relied on a *public* surveillance case. *Id.* (citing *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999)). While the court mused that "the idea of a video camera constantly recording activities on one's property is undoubtedly unsettling to some," it concluded that Petitioner "had no legitimate expectation of privacy, [and] the agents were free, *as on public land*, to use video surveillance to capture what any passerby would have been able to observe." *United States v. Vankesteren*, 553 F.3d at 291 (emphasis added).

To address the issue of hidden video surveillance, the court turned to *United States v. Taketa*, 923 F.2d 665 (9th Cir. 1991), in which the Ninth Circuit held that the use of the hidden surveillance camera *did* violate the defendant's reasonable expectation of privacy. Quoting dicta, the court emphasized, "videotaping of suspects in public places, such as banks, does not violate the fourth amendment." *United*

States v. Vankesteren, 553 F.3d at 291. The court again conflated the jurisprudence governing public land and private, posted open fields.

Finally, the court plainly extended the open fields doctrine while seeming to feel bound to do so by precedent. The court asserted that the VDGIF "could have stationed agents to surveil Vankesteren's property twenty-four hours a day," relying on *Oliver* as demanding this conclusion. *United States v. Vankesteren*, 553 F.3d at 291. The *Oliver* Court, however, did not contemplate *constant* surveillance, nor did it extend its rule beyond the *Oliver* facts, which did not include surveillance *at all*, but rather involved an examination of the officers' entry onto the property and continued presence while traveling about one mile on foot to discover a marijuana field. *Oliver*, 466 U.S. at 173. The court convinced itself that "the camera did little more than the agents themselves could have physically done," without acknowledging that the camera was hidden in ways that the officers could not have hidden themselves and that the camera engaged in around-the-clock, constant surveillance, which the officers concede they were unable to accomplish. *United States v. Vankesteren*, 553 F.3d at 291.

REASONS FOR GRANTING THE WRIT

This Court has never extended the open fields doctrine beyond physical observations by a government agent, nor has this Court ever authorized hidden, unattended video surveillance on private property absent a warrant. The Fourth Circuit, in direct conflict with other circuits' interpretation of lawful, constitutional video surveillance, as well as with the Fifth Circuit's interpretation of what type of

police activity is constitutional in an open field, has limited the protections of the Fourth Amendment in ways never before contemplated or authorized by this Court or any other court.

The open fields doctrine allows law enforcement officers to enter posted, private areas that are not part of the house or its curtilage for investigative purposes. *Oliver*, 466 U.S. 170 (1984). This Court has never authorized hidden video surveillance on private property without prior authorization or consent. *See generally Brown v. Texas*, 433 U.S. 47 (1979); *Katz v. United States*, 389 U.S. 347, 353 (1967). Further, this Court has never "extended the open fields doctrine to anything beyond observation searches." *Husband v. Bryan*, 946 F.2d 27, 29 (5th Cir. 1991); *see also Donovan v. Dewey*, 452 U.S. 594 (1984). Because the lower court misapplied and extended the open fields doctrine to authorize constitutionally impermissible hidden video surveillance on posted, private property, this Court should grant the writ to correct the error. Moreover, Petitioner's case provides an opportunity for the Court to reconsider an unfettered open fields doctrine and the government excesses and incursions that may infringe upon a citizen's justifiable expectations of privacy, even in open fields, in a world full of modern technology, such as constant, hidden video surveillance.

I. THE OPEN FIELDS DOCTRINE HAS REASONABLE LIMITATIONS BEYOND WHICH SOCIETY WILL NOT TOLERATE INCURSIONS INTO REASONABLE EXPECTATIONS OF PRIVACY.

Tantamount to the open fields doctrine is this Court's most fundamental Fourth Amendment jurisprudence: the Fourth Amendment shields people

"from unreasonable government intrusions into . . . legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7 (1977). As this Court has repeatedly declared, "[t]he Fourth Amendment protects people, not places." *See, e.g., Katz*, 389 U.S. at 351, n.9. A farmer in an open field does not constantly expose his activities to the public such that he declares those activities devoid of any expectation of privacy. He might reasonably expect that his "No Trespassing" signs would not "effectively bar the public from viewing open fields in rural areas," but he should be able to reasonably expect that his "No Trespassing" sign would deter or prevent constant encampment by a game warden or his prying, hidden video camera. *Oliver*, 466 U.S. at 179. And while a farmer should reasonably expect that government planes may fly overhead and survey and photograph his property, he should not reasonably expect, nor should society tolerate, the constant probing eye of the government into his activities in an open field captured by a hidden video camera. *Id.* The simplistic "locational theory of the coverage of the Amendment" employed by the Fourth Circuit fails to reflect the wealth of Fourth Amendment jurisprudence that should govern the complex question presented by Petitioner. *See Oliver*, 466 U.S. at 187-88 (Marshall, J., dissenting).

Justice Marshall's warning in dissent in *Oliver* has come to life in the present case. "By exempting from the coverage of the [Fourth] Amendment large areas of private land, the Court opens the way to investigative activities we would all find repugnant." *Oliver*, 466 U.S. at 196 (Marshall, J., dissenting). With total disregard for the extreme incursion into socially tolerated expectations of privacy, the Fourth Circuit in *United States v. Vankesteren* has authorized the

government to enter private, posted property, install a hidden surveillance system, video record activities of people for long periods of time, and use any evidence gleaned from the videotape as evidence in criminal prosecution. If this decision stands, law enforcement officers throughout the United States should start investing in small, reliable video cameras that are easily hidden because officials will now be allowed to videotape a person's every move, even when he is moving on his own posted, private property.[1]

A. The Fourth Circuit Erred in Relying On *Oliver* to Extend the Open Fields Doctrine.

In *Oliver* and its companion case, *Maine v. Thornton*, 466 U.S. 170 (1984), the Court defined "government intrusion" by the facts of the two cases. In each case, an officer received information that the defendant might be growing marijuana in the fields near his home. *Oliver*, 644 U.S. at 173-75. In each case, the officer disregarded "No Trespassing" signs, walked into and through areas bordered by private fencing, and travelled some distance by foot through the private property to discover a marijuana field. *Id.* The Court concluded that, because society would not recognize as reasonable an expectation of privacy in an open field, the defendants were unreasonable in

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[1] In his warning to the majority of the new, repugnant investigative techniques that officer might employ following *Oliver*, Justice Marshall suggests the future with reference to *United States v. Lace*, 669 F.2d 46, 54 (2d Cir. 1982) (Newman, J., concurring in result) ("[W]hen police officers execute military maneuvers on residential property for three weeks of round-the-clock surveillance, can that be called reasonable?").

asserting an expectation of privacy from the kind of government intrusion that they experienced. *Id.* at 179. Notably, the Court did not extend its rule to cover any and all government intrusion, as it did not contemplate situations beyond the brief intrusion experienced by Oliver and Thornton. The Court, implicitly, tied its determination that Oliver and Thornton did not have a *legitimate* expectation of privacy to the fact that each Defendant sought to conceal his criminal activities by planting marijuana upon secluded land and behind fences and "No Trespassing" signs. *Oliver*, 466 U.S. at 182.

Oliver stands for the proposition that the Fourth Amendment does not prevent an officer from entering private property for an inspection of conditions in open fields or areas that "do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." *Oliver*, 466 U.S. at 179. Arguably, in an effort to aid the raging war on drugs, in *Oliver*, the Court extended its open fields doctrine with little regard to the bulk of its Fourth Amendment jurisprudence. *See* Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (as Illustrated by the Open Fields Doctrine)*, 48 U. Pitt. L.R. 1 (1986).

The open fields doctrine was first established in *Hester v. United States*, 265 U.S. 57 (1924). The facts in *Hester*, however, did not offer the Court an opportunity to address whether a trespassing officer would have violated the Fourth Amendment. Rather, the Court held only that a government agent's seizure of abandoned personal property on an open field did not violate the Fourth Amendment. *Hester*, 265 U.S. at 58-59. But after deciding *Hester*, the Court continued

to examine the trespassory nature of government agents' conduct in Fourth Amendment cases. *See Olmstead v. United States*, 277 U.S. 438 (1928); *Goldman v. United States*, 316 U.S. 129 (1942); *On Lee v. United States*, 343 U.S. 747 (1952); *Silverman v. United States*, 365 U.S. 505 (1961).

The Court in *Oliver* concluded "that the government's intrusion upon the open fields is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment." *Oliver*, 466 U.S. at 177. Because the Fourth Amendment extends only to "persons, houses, papers, and effects," and not, as James Madison wished, to "other property," the distinction between the protected house and the unprotected "other property" evolves properly as pure textual construction. *See* U.S. Const. amend IV; *Oliver*, 466 U.S. at 176-77 (quoting, Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 100, n.77 (1937)).[2] Though the common law plainly recognized

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[2] Four states have disagreed with the expansive open fields doctrine set out in *Oliver*. Vermont's constitution offers more protection than the U.S. Constitution. *See* Vt. Const. Ch. I, Art. 11 ("the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure"); *State v. Kirchoff*, 587 A.2d 988 (Vt. 1991) ("a lawful possessor may claim privacy in 'open fields' . . . where indicia would lead a reasonable person to conclude that the area is private"). Mississippi, New York, and Oregon have interpreted their constitutions, which have essentially the same language as the U.S. Constitution, as offering more protection to their citizens than this Court authorized in *Oliver*. *See, e.g., Falkner v. State*, 98 So. 691 (Miss. 1924); *People v. Scott*, 79 N.Y.2d 474, 486 (1992) ("A constitutional rule which permits State agents to invade private lands for no reason at all without permission and in outright disregard of the owner's efforts to maintain privacy by fencing or posting signs–is one we cannot accept as adequately preserv-

trespass as an improper incursion onto land, the Court ignored the profound conflict created by its open fields doctrine and common law trespass principles. *Id.* at 180. Read in the extreme, after *Oliver*, government agents may break down fences to enter private property and ignore demands to leave private property without fear of prosecution. *See* Saltzburg, *supra*, at 19.

This Court may find that, consistent with the holding in *Oliver*, Petitioner did not have a reasonable expectation of privacy from the game warden's warrantless wandering onto his posted, private property on an anonymous tip that Petitioner was trapping protected birds, though by doing so the Court would be extending the open fields doctrine to cover dynamic activity beyond the fairly static condition of the marijuana fields present in *Oliver*. Perhaps if the game warden had found endangered red-tailed hawks in Petitioner's trap on his first foray onto Petitioner's open field, instead of the lawfully-trapped pigeons, the government could have used that evidence in a prosecution of Petitioner. The government's intrusion, however, did not stop at one instance of trespassing. Rather, the government's extended intrusion into Petitioner's privacy provoked the Fourth Circuit to employ significant extensions to this Court's open fields doctrine. Unlike the agent in *Oliver*, the game warden found no evidence of any crime when he investigated Petitioner's open field in December 2006; to the contrary, his warrantless investigation produced only evidence of lawful trapping. (App. C at 19.)

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ing fundamental rights of New York citizens."); *State v. Dixon*, 766 P.2d 1015 (Or. 1988).

Despite significant factual differences between Petitioner's case and *Oliver*, the Fourth Circuit declined to examine the breadth of Fourth Amendment jurisprudence in favor of applying *Oliver* and the open fields doctrine in an absolute manner. But the *Oliver* Court expressed a specific limitation when it created the rule: "The correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police *inspection* of open fields accomplishes such an infringement." *Oliver*, 466 U.S. at 182-83 (emphasis added). Any infringement beyond a police inspection, like the brief inspections in *Oliver* and *Thornton*, requires extended Fourth Amendment consideration. *Id.* at 174 (noting that, in *Thornton*, the officer obtained a warrant before he returned to the field to investigate further). For example, after the game warden entered Petitioner's property on an anonymous tip, his effort to corroborate the tip stalled. Further, he found evidence in specific contradiction to the anonymous tip; specifically, he found lawfully-trapped pigeons and other carcasses of animals that could have been lawfully trapped, not unlawfully-trapped endangered birds. Moreover, the game warden then personally entered the posted, private property on at least four more occasions without gathering any evidence to further substantiate the cold, discredited anonymous tip. (App. C at 35-38.) On one of these excursions onto Petitioner's open field, the game warden "was worried at that point that possibly the suspect would recognize we were in a marked vehicle." (App. C at 36.) The game warden's conduct amounted to prolonged spying, not merely the police brief inspection authorized under *Oliver*.

Certainly the Court in *Oliver* did not authorize nor make lawful any constant police encampment in a posted, private open field for the purpose of spying on a suspect's activities. While "the premise that property interests control the right of the Government to search and seize has been discredited," the *Oliver* Court did not wholly abandon an examination of property interests. *Oliver*, 466 U.S. at 183 (quoting *Katz*, 389 U.S. at 353). The Court was satisfied that it was not required to follow the law of trespass, which forbids intrusions onto posted, private lands, in defining whether open fields deserved Fourth Amendment protection. But when the Court declared that "the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment," it did so under limited facts that posed significantly less government intrusion than Petitioner has withstood in the instant case. *Id.* at 183-84. "One of the purposes of the law of real property (and specifically the law of criminal trespass) is to define and enforce privacy interests—to empower some people to make whatever use they wish of certain tracts of land without fear that other people" (or the government) "will intrude" (or encamp and spy) "upon their activities." *Id.* at 190, n.10 (Marshall, J., dissenting).

B. The Fourth Circuit Decision Stands in Conflict With Other Circuits' Limits on the Open Fields Doctrine.

The federal circuits consistently apply the open fields doctrine, but the factual circumstances are, likewise, consistently similar to *Oliver*. The two features that most often compel application of the open field doctrine are 1) a one-time, brief intrusion for investigation of 2) a somewhat static, agricultural

condition. *See, e.g.*, *United States v. Hayes*, 551 F.3d 138 (2d Cir. 2008) (cocaine cultivation); *Allinder v. Ohio*, 808 F.2d 1180 (6th Cir. 1987) (beehives); *United States v. Broadhurst*, 805 F.2d 849 (9th Cir. 1986) (marijuana cultivation). The Fifth Circuit has specifically held that open fields analysis cannot ignore justifiable expectations of privacy analysis in all cases. *Husband*, 946 F.2d at 30. In *Husband v. Bryan*, the Fifth Circuit recognized a reasonable expectation of privacy in the land under an open field and declared government agents must comply with the warrant requirement before removing dirt in an open field. *Id.* at 29.

Here, as in *Husband*, the government agent performed more than a simple observational search of Petitioner's open field. The game warden had entered the posted, private property repeatedly without gathering incriminating evidence, then, without a warrant, installed a hidden video camera to constantly videotape dynamic conditions in a broad area of an open field. The minor, fleeting, criminal trespassing conduct of the officers in *Oliver, Thornton, Hayes, Allinder,* and *Broadhurst* was tolerable, and society would not be willing to recognize otherwise; however, repetitive, long-term, and enduring trespassing by a live game warden and a hidden video camera will provoke, and has already provoked, a markedly different response from society. *See, e.g.*, Editorial, *Ruling on Camera Badly Out of Focus*, Virginia-Pilot, Feb. 21, 2009, *available at* http://hamptonroads.com/2009/02/ruling-camera-badly-out-focus. Moreover, while marijuana growers cannot *legitimately* expect Fourth Amendment privacy protection from officers engaged in a brief investigation, farmers who are not cultivating illegal crops can and should expect Fourth Amendment privacy from the

constant, trespassing, spying eye of the government. *Oliver*, 466 U.S. at 182.

At its heart, the Fourth Amendment protects the people from "unreasonable search and seizure." U.S. Const. amend IV. The open fields doctrine does not extinguish the protection of the Fourth Amendment from the type of unreasonable search that occurred in this case.

II. VIDEO SURVEILLANCE REQUIRES MORE SCRUTINY THAN LIVE SURVEILLANCE, AND THE FOURTH CIRCUIT ERRED IN FAILING TO CONSIDER THE INVASIVE EFFECT OF VIDEO SURVEILLANCE ON ITS OPEN FIELDS ANALYSIS.

Petitioner's case shows that an untrammeled open fields doctrine is incompatible with the intrusive nature of video surveillance. The Fourth Amendment requires that constant video surveillance be held to a higher level of scrutiny under the open fields doctrine.

"Every court considering the issue has noted [that] video surveillance can result in extraordinarily serious intrusions into personal privacy . . . . If such intrusions are ever permissible, they must be justified by an extraordinary showing of need." *United States v. Koyomejian*, 970 F.2d 536, 551 (9th Cir. 1992) (Kozinski, J., concurring). "Hidden video surveillance is one of the most intrusive investigative mechanisms available to law enforcement. The sweeping, indiscriminate manner in which video surveillance can intrude upon us, *regardless of where we are*, dictates that its use be approved only in limited circumstances." *United States v. Nerber*, 222

F.3d 597, 603 (9th Cir. 2000) (emphasis added). While Petitioner is bound to expect that he may be observed on his posted, private open fields, he still maintains a reasonable expectation that he would not be subjected to such a severe intrusion into his privacy: the probing, constant eye of the hidden video camera. *See Bond v. United States*, 529 U.S. 334 (2000) (noting that some invasive inspections are simply more invasive than others).

A. The Fourth Circuit's Opinion Conflates Open Fields and Public Lands to Reach a Conclusion Unsupported by the Fourth Amendment.

The Ninth Circuit has held that images captured by a government agent's installation of a hidden video camera placed on public, national forest lands, which are open to the public, do not violate the Fourth Amendment. *United States v. McIver*, 186 F.3d 1119, 1125-26 (9th Cir. 1999). In *McIver*, a camera was installed and hidden on public lands, and the *McIver* court praised the government agent's "prudent and efficient use of modern technology" by installing the video camera on public land and video recording public activities. *Id.* at 1125. The *McIver* court, however, noted that its holding was "quite narrow," with the decision hinging on the fact the government agent installed the hidden video camera on public lands. *Id.* at 1125-26. Similarly, video cameras mounted in public places, recording activities open to public observation, are lawful and do not violate the Fourth Amendment even if the video camera records continuously. *See, e.g., State v. Holden*, 964 P.2d 318 (Utah App. 1998). If a corps of law enforcement officers stood on public property for several weeks, in shifts, and observed activities con-

ducted in a space that was private yet visible to the public, then the police engaged in lawful, constitutional surveillance.

The Fourth Circuit failed to analyze the difference when it examined only the images captured rather than noting the unlawfulness of the trespassory installation in Petitioner's case. An "efficient use of modern technology" cannot turn an unconstitutional intrusion in Petitioner's case into lawful investigation. *See McIver*, 186 F.3d at 1125. In Petitioner's case, the game warden could not have stood on Petitioner's posted, private property for the weeks that the hidden video camera recorded. First, by the game warden's own testimony, Petitioner would have likely seen the trespassing game warden and ejected him from the property or called the police to arrest the game warden for trespassing. *See* Va. Code § 18.2-119; (App. C at 36.) The video camera was hidden in a way that a live game warden could not have hidden himself. Second, the game warden admitted that the VDGIF did not have the human resources to observe Petitioner constantly for two weeks, as the video camera was able to observe and record. (App. C at 37-38.) A lack of human resources at the VDGIF simply does not create a justifiable, new exception to the limitations on video recording private activities.

The Fourth Circuit relies on dicta in *United States v. Taketa* to establish that, "[v]ideo surveillance does not in itself violate a reasonable expectation of privacy. Videotaping of suspects in *public* places, such as banks, does not violate the fourth amendment; the police may record what they normally may view with the naked eye." *United States v. Vankesteren*, 553 F.3d at 290 (citing *Taketa*, 923 F.2d

at 677). The Fourth Circuit, however, has misinterpreted *Taketa*. The court in *Taketa* concluded that the suspect's reasonable expectation of privacy in his office had been violated by the hidden video camera *even though* the suspect was a DEA agent and his office was one that could have been entered and observed by snooping law enforcement agents. *Taketa*, 923 F.2d at 665. The Fourth Circuit fails to analyze the plain parallel with Petitioner's case: if the snooping game warden, like the snooping DEA agents, had been standing and observing rather than recording by hidden video camera, he would have been seen and ejected, just as the trespassing or intruding agents in *Taketa* would have been seen and ejected. *Id.*

Moreover, the Ninth Circuit has stated that once the police officer leaves an area and can no longer observe the activities from a public space, he may not video record the private activities. *See, e.g.*, *Nerber*, 222 F.3d at 603. The Fourth Circuit acknowledges that the camera was doing more, albeit "little more than the agents themselves could have physically done," yet wholly disregards the need to engage in additional analysis when the camera *does more* than the agents themselves could have done. *United States v. Vankesteren*, 553 F.3d at 291; *see also Hoffa v. United States*, 385 U.S. 293 (1966); *United States v. Nerber*, 222 F.3d at 604 ("the defendants had no reasonable expectation of privacy that they would be free from hidden video surveillance *while the informants were in the room*" (emphasis added)).

B. This Court's Decision in *Kyllo v. United States* Indicates that Technology Affects the Fourth Amendment Analysis of a Search.

The Fourth Circuit asserted that "the placement of a video camera in an open field does not portend the arrival of the Orwellian state" that it might if the game warden had taken thermal images of Petitioner's home. *United States v. Vankesteren*, 553 F.3d at 291 (citing *Kyllo v. United States*, 533 U.S. 27 (2001)). But, to the contrary, the Court's decision in *Kyllo* suggests that the use of technology to enhance surveillance can affect the Fourth Amendment analysis of a potential search. *Kyllo,* 533 U.S. at 29.

In *Kyllo*, the Court considered whether the Fourth Amendment applied to the government's use of a thermal-imaging device and held that the government had performed a search within the meaning of the Fourth Amendment when an agent of the United States Department of the Interior used a thermal-imagining device to detect relative amounts of heat within a private home. *Id.* at 29. The thermal imaging device did not literally allow the agent to see inside the home, but it allowed the agent to obtain information, which was otherwise unavailable to him through personal observation (i.e., "naked-eye surveillance of a home"), about the inside of the home by measuring the radiation of heat emitted from the outside of the house. *Id.* at 33-35 (quoting *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

The use of the thermal imaging technology, like the use of a hidden video camera in Petitioner's case, turned commonplace observation of a home into a search because it allowed the government to obtain

information that would have otherwise required a known search. *Id.* at 34. Although *Kyllo* narrowly addresses the search of a home, the intense scrutiny given to the government's use of technology suggests that the Court is wary of whittling away constitutional protections in the wake of increased technological capabilities. Unlike the minority in *Kyllo*, which would have found no search because the surveillance only involved observations of the exterior of the home, *id.* at 41 (Stevens, J., dissenting), the majority found that the use of technology changed the character of the surveillance in a way that was constitutionally significant. In a technical sense, the government agents only searched heat emanating from the outside of a house; such openly-perceivable heat receives no constitutional protection. The use of technology to observe that heat, however, changed the nature of the surveillance into a constitutionally impermissible search. *Id.*

The Fourth Circuit in this case failed to consider the use of technology and the effect that technology has on Fourth Amendment analysis. All Fourth Amendment questions hinge on an analysis of the reasonableness of the government intrusion. *See* U.S. Const. amend. IV. Unaided visual observation of the outside of a home does not constitute a Fourth Amendment search. *See Dow Chemical Co. v. United States*, 476 U.S. 227, 234-35 (1986). In *Kyllo*, however, the Court refined its holding from *Dow Chemical* because the government in *Kyllo* had used technologically-enhanced surveillance. Similarly, this Court has not determined whether the use of a technological enhancement—here, an ever-present, hidden video camera installed on posted, private property—should affect the Fourth Amendment analysis regarding the reasonableness of a government

intrusion into an open field. Petitioner's case provides an important opportunity to refine, and limit, the holdings from *Oliver* and *Hester*.

The use of a permanent, hidden video camera should constitute a constitutionally significant change to the character of what would otherwise be a constitutional foray onto a private citizen's open field. For example, a video camera allows the government to continuously collect information about an individual without the need for a law enforcement officer to actually remain on the property. The Fourth Circuit found this point to be insignificant, noting that the government could have stationed agents on the property "twenty-four hours a day" and that the use of a "more resource-efficient surveillance method" was of no importance. *United States v. Vankesteren*, 553 F.3d at 291. This argument ignores, however, the fact that the government would have been unlikely, or even unable, to station an agent on the property twenty-four hours a day. Limitations on resources provide a check on the ability of the government to engage in this type of constant surveillance. *See, e.g.*, *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007) (noting that "[t]echnological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive"). As in *Kyllo*, the government in Petitioner's case used a technological enhancement to do something that it would not have been able to do otherwise, and, as in *Kyllo*, this technological enhancement allowed the government to collect constitutionally unprotected information and infringe upon the privacy of an individual. Accordingly, the technological enhancement should affect the Fourth

Amendment analysis in ways the Fourth Circuit refused to acknowledge.[3]

The fact that the government could use the video camera to collect information and store it for later inspection and dissemination should change the character of the surveillance such that it should be considered a violation of the Fourth Amendment. A video camera can record information in a permanent, transferrable, and reviewable form, which allows for closer and more probing inspection and can reveal details that would be unavailable from a government agent's mere unaided perception. The Court has previously found no constitutional significance to the fact that otherwise unprotected information was recorded by a still camera, *see Dow Chemical*, 476 U.S. at 238, but the more invasive aspects of video cameras, including the continuing development of video enhancement technology through magnification and face recognition, strongly suggest that video cameras should be treated differently.

C. Other Courts Have Recognized that Video Surveillance is More Intrusive Than Unaided Surveillance.

A number of federal and state courts have recognized that video cameras are more invasive than the unaided eye. *See, e.g., United States v. Torres*, 751 F.2d 875, 882 (7th Cir. 1984) (noting that video cameras "could be grossly abused—to eliminate per-

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[3] The Supreme Court has elsewhere noted that the use of invasive surveillance techniques may change the Fourth Amendment character of otherwise constitutionally permissible actions. *See United States v. Knotts*, 460 U.S. 276 (1983) (noting that "dragnet-law enforcement practices" could require "different constitutional principles").

sonal privacy as understood in modern Western nations"); *United States v. Falls*, 34 F.3d 674, 680 (8th Cir. 1994) (noting that "silent video surveillance . . . results in a very serious, some say Orwellian, invasion of privacy"); *United States v. Taketa*, 923 F.2d at 677 (noting that "[p]ersons may create temporary zones of privacy within which they may not reasonably be videotaped . . . even when that zone is a place they do not own or normally control"); *United States v. Cuevas-Sanchez*, 821 F.3d 248, 252 (5th Cir. 1987) (video "surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state"); *State v. Thomas*, 642 N.E.2d 240, 246-47 (Ind. Ct. App. 1994) (noting that "[v]ideo surveillance is highly intrusive and amenable to abuse, and a warrantless video search poses a serious threat to privacy"); *State v. Bonnell*, 856 P.2d 1265, 1277 (Haw. 1993) (stating that "[w]e agree with the . . . Fifth Circuit that [video] 'surveillance provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state'").

These cases and *Kyllo* show that the use of technology should change the analysis by which the Fourth Amendment applies to otherwise constitutional surveillance. The use of a video camera with the ability to record Vankesteren's property at any time, without the presence of a government agent, gave the government the ability to perform more invasive searches than it could have without the aid of technology. Like the thermal imaging in *Kyllo*, this intrusion into a citizen's privacy should be reviewed and found unconstitutional.

D. The Fourth Circuit's Opinion Fails to Acknowledge the Impact of an Invasive Video Camera Placed in an Open Field.

The Fourth Circuit devoted some effort to determine whether Petitioner's field might be considered curtilage under the four-factor test established in *United States v. Dunn*, 480 U.S. at 301. Petitioner's field was outside of the allowable curtilage area because it was located a mile or more from his home and was used primarily for farming activities. *United States v. Vankesteren*, 553 F.3d at 290. Because the game warden installed the video camera on a posted, private open field, the Fourth Circuit equated the open field to public lands and concluded that the installation of the video camera and subsequent video recordings did not violate the Fourth Amendment. *Id.* at 290-91. Had the game warden, instead, pointed his camera towards the Petitioner's house, the Fourth Circuit's rationale would hold that the recording did not violate the Fourth Amendment, so long as the court could have determined that Petitioner had not built a fence to demonstrate his subjective expectation of privacy—from trespassers in his open field. Because the Fourth Circuit treats the installation of the camera in an open field as identical to installation of a camera in public, it follows that the court would have viewed any observation of unprotected curtilage by the hidden video camera as permissible. This presents a profound and troubling extension of lawful, constitutional intrusion by government agents.

Law enforcement officers may fly overheard and lawfully photograph subjectively private activities and conditions without raising the spectre of the

Orwellian state because a one-time overhead flight, like a glance over a backyard fence, are intrusions that society is willing to tolerate. *United States v. Cuevas-Sanchez*, 821 F.2d at 251 (citing *California v. Ciraolo*, 476 U.S. 207 (1986)). In *Cuevas-Sanchez,* the Fifth Circuit stated that installing a video camera on a public utility pole pointed to monitor a person's backyard activities "provokes an immediate negative visceral reaction." *Id.* The lawful glance over the fence, like the trespassing game warden's glance as he ambles through a posted, private open field, does not violate the Fourth Amendment's guarantee of protection from unreasonable searches. Had Cuevas-Sanchez not demonstrated a subjective expectation of privacy by enclosing his curtilage with a fence, the court would have engaged in significantly less analysis regarding the probing eye of the video camera since the camera was installed on a public utility pole. *Id.*

Following the Fourth Circuit's reasoning, however, any video camera posted in an open field is the same as a video camera posted on a public utility pole, though the homeowner on a busy street might, reasonably, fence his curtilage for privacy, while a farmer who owns thousands of acres of open field might not fence his yard from the probing eye of the criminal trespasser. The twisted logic of the Fourth Circuit commands farmers to fence the area near their home separately from their own posted, private open fields to demonstrate any reasonable expectation of privacy from the probing, continuous eye of a hidden government video camera on the curtilage. James Madison would be appalled.

In the words of the Ninth Circuit, "Even if one cannot expect total privacy while alone" in an open

field (where a trespassing neighbor or a snooping government agent might walk by), "this diminished privacy interest does not eliminate society's expectation to be protected from the severe intrusion of having the government monitor private activities through hidden video cameras." *United States v. Nerber*, 222 F.3d at 604.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted.

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April 8, 2009

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-4110

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

STEVE VANKESTEREN,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.

Rebecca Beach Smith, District Judge.
(2:07-er-00153-RBS-1)

Argued: December 3, 2008
Decided: January 8, 2009

Before MOTZ, GREGORY, and SHEDD, *Circuit Judges*.

OPINION GREGORY, *Circuit Judge*:

The appellant in this case, Steve Vankesteren, invites us to consider the application of the Fourth Amendment to a product of modern surveillance

technology: namely, a hidden, fixed-range, motion-activated video camera placed in the appellant's open fields. We find that the protective wall of the Fourth Amendment does not shield the appellant from the Commonwealth's use of such a camera, and we therefore affirm the decision of the district court.

I.

Appellant Vankesteren is a farmer on the Eastern Shore of Virginia. In December 2006, the Virginia Department of Game and Inland Fisheries ("VDGIF") received a telephone call alerting them that a protected bird was trapped in a cage in Vankesteren's fields near a public road. Steve Garvis, an agent with VDGIF, responded to the call and observed a trap that was one-to-two feet high and contained five leghold traps—one on top of the cage and four surrounding it. The trap was uncovered and set, and it contained one live and one dead pigeon inside. Garvis had allegedly seen a similar trap on Appellant's property in 2003 and on the internet being advertised for the purpose of hawk trapping. In January 2007, Garvis contacted the VDGIF's Special Operations Division in order to obtain video surveillance of the trap. Such cameras were used because there were only five VDGIF special agents in the Commonwealth. The camera had a viewing area of twelve-by-twelve feet, ran only during daylight hours, and was motion activated. On January 11, 2007, Garvis and the special operations agents installed the camera without a warrant.

On January 24, 2007, Special Operations Agent Gene Agnese notified Garvis that he had obtained surveillance foot-age of two birds being trapped and killed at the site of the camera. Vankesteren killed the first bird on January 17. Garvis could not identify

the bird in the footage with certainty, but he narrowed the possibilities to a red-tailed hawk, broadwing hawk, or red-shouldered hawk. Vankesteren killed the second bird with an ax on January 20, and Garvis identified the bird in that footage as a red-tailed hawk. Agnese advised Garvis that their carcasses were likely along the hedgerow by the trap, just outside the camera's viewing area. On January 25, 2007, Garvis went to the area and located the carcasses. He identified both of the birds by their markings as red-tailed hawks. One of the hawks had sustained severe head damage, consistent with the video footage, and the other carcass was of an immature red-tailed hawk. The birds had not been eaten and had not begun decomposing.

On January 30, 2007, Garvis and Agent Dan Rolince of the U.S. Fish and Wildlife Service met with Vankesteren at his residence. He admitted to catching some hawks by accident and placing their carcasses by the hedgerow. Vankesteren was charged in the U.S. District Court for the Eastern District of Virginia with two counts of taking or possessing a migratory bird without a permit, in violation of 16 U.S.C. § 703 (2006) and 50 C.F.R. § 21.11 (2008). Vankesteren appeared pro se before a magistrate judge on August 7, 2007. The judge refused to suppress the video surveillance footage and found the appellant guilty on both counts, imposing a $500 fine for each count, along with a $10 special assessment and $25 processing fee. Vankesteren appealed the magistrate judge's ruling, but the district court found no error and entered a final judgment against him on December 21, 2007. Vankesteren subsequently appealed to this Court.

II.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 (2000). "In reviewing a denial of a suppression motion, the court reviews the district court's factual findings for clear error and the district court's legal conclusions *de novo*," *United States v. Johnson*, 114 F.3d 435, 439 (4th Cir. 1997). We review the sufficiency of evidence on appeal by viewing it and all inferences "in the light most favorable to the Government." *United States v. Bursey*, 416 F.3d 301, 306 (4th Cir. 2005). Findings of law are reviewed *de novo*, and findings of fact are reviewed for clear error. *Id.*

A.

Vankesteren largely conceded in oral argument that the VDGIF placed its camera in a constitutionally unprotected open field, but a review of the Supreme Court's open-fields doctrine is nonetheless essential to our consideration of this case. In *Hester v. United States*, 265 U.S. 57, 59 (1924), the Supreme Court first held that the protection of the Fourth Amendment did not extend to open fields. In that case, revenue officers went to Hester's house and observed an illegal moonshine transaction from fifty to one-hundred yards away on Hester's land. *Id.* at 58. The Court found no Fourth Amendment violation. *Id.* at 59.

The open-fields doctrine was clarified in *Oliver v. United States*, 466 U.S. 170 (1984). There, the Supreme Court considered two cases in which marijuana was being grown in wooded areas on the defendants' properties. In one instance, the police walked around a locked gate with a "No Trespassing" sign, passed a barn and parked camper, and continued after someone shouted at them to leave. A mile from the defendant's house, they found the marijuana field. *Id.* at 173. In the other case, police followed a path

between the defendant's residence and the neighboring house into the woods until they saw two marijuana patches surrounded by chicken wire. Upholding both searches, the Court held that "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home [the curtilage]." *Id.* at 178. The Court further noted, "An open field need be neither 'open' nor a 'field' as those terms are used in common speech. For example . . . a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment." *Id.* at 180 n.11.

In *United States v. Dunn*, 480 U.S. 294 (1987), the Supreme Court considered a case that involved property that was approximately fifty yards from the main residence and on which officers took the following actions:

> [They] crossed over the perimeter fence and one interior fence. Standing approximately midway between the residence and the barns, the DEA agent smelled what he believed to be phenylacetic acid, the odor coming from the direction of the barns. The officers approached the smaller of the barns—crossing over a barbed wire fence—and, looking into the barn, observed only empty boxes. The officers then proceeded to the larger barn, crossing another barbed wire fence as well as a wooden fence that enclosed the front portion of the barn. The officers walked under the barn's overhang to the locked wooden gates and, shining a flashlight through the netting on top of the gates, peered into the barn.

Id. at 297-98. Once more, the Court found that there was no Fourth Amendment violation. *Id.* at 301.

The *Dunn* Court established four factors to consider when resolving questions about the boundaries of curtilage: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by." *Id.* at 301; accord *United States v. Breza*, 308 F.3d 430, 435 (4th Cir. 2002), Applying the factors, the Court found that the barn was sixty yards from the house, it was outside the fence surrounding the house, police had objective data—aerial photographs—that showed the barn was not being used for intimate activities, and there was no indication that the interior fences were designed to keep people out. *Dunn*, 480 U.S. at 302-03.

Given the facts of these Supreme Court decisions, Vankesteren has little on which to base his case. Vankesteren's fields were located a mile or more from his home, the land was being used for farming and not intimate activities, VDGIF had received a report of a trapped protected bird, and there is no indication in the record that Vankesteren had taken any steps to protect his field from observation. Therefore, under the Supreme Court's jurisprudence, the subject land must be classified as open fields and not curtilage, and Vankesteren has no reasonable expectation of privacy in those open fields.

As noted previously, Vankesteren has essentially conceded this point. Vankesteren instead stakes his case on the argument that hidden surveillance cameras are subject to a higher degree of Fourth Amendment scrutiny. He cites cases in support of that proposition; yet, none of these cases involve open

fields where the defendant presumably has no reasonable expectation of privacy.

In *United States v. Taketa*, 923 F.2d 665 (9th Cir. 1991), the Ninth Circuit found that a DEA agent had a reasonable expectation of privacy in his office, and that expectation was violated through the use of hidden video surveillance. In so finding, however, the court noted, "Video surveillance does not in itself violate a reasonable expectation of privacy. Videotaping of suspects in public places, such as banks, does not violate the fourth amendment; the police may record what they normally may view with the naked eye." *Id.* at 677. In *United States v. Nerber*, 222 F.3d 597 (9th Cir. 2000), the Ninth Circuit suppressed hidden video surveillance, but did so because it found that drug dealers had a legitimate expectation of privacy in their hotel room after police informants left.

The Fifth Circuit considered a closer case in *United States v. Cuevas-Sanchez*, 821 F.2d 248 (5th Cir. 1987). There, the police placed a camera on top of a power pole overlooking the defendant's ten-foot-high fence surrounding his back yard. The court found that the defendant had a reasonable expectation of privacy that would have been violated because the fence surrounded his curtilage. However, because the police properly obtained a court order for the surveillance, the court affirmed his conviction. *Id.* at 251-52. This case also does not help Vankesteren because VDGIF's camera was not placed within or even near the curtilage of his home.

Vankesteren then attempts to distinguish his case from *United States v. McIver*, 186 F.3d 1119 (9th Cir. 1999), the most directly relevant case on this issue. In that case, law enforcement agents placed unmanned, motion-activated surveillance cameras onto

land in a national forest in order to monitor a patch of marijuana plants. The agents used the footage from the cameras in order to identify and track down the defendants in the case. The court held that the placement of the cameras on public land, open to all, did not violate the defendants' Fourth Amendment rights. *Id.* at 1125-26.

While *McIver* involved public land and this case involves private land, the effect is still the same: just as one would not have a reasonable expectation of privacy in a national forest, the foregoing cases demonstrate that Vankesteren had no reasonable expectation of privacy in the open fields where he killed the hawks. Those fields were located a mile or more from his home, near a public road, and as evidenced by the phone call reporting the trap, the land was accessible to other members of the public. Vankesteren notes that he felt comfortable enough to relieve himself there, but that is of no consequence under our jurisprudence.[1]

The idea of a video camera constantly recording activities on one's property is undoubtedly unsettling to some. Individuals might engage in any number of intimate activities on their wooded property or open field—from romantic trysts under a moonlit sky to relieving oneself, as in Mr. Vankesteren's case—and do so under the belief that they are not being observed. But the protection of the Fourth Amendment is not predicated upon these subjective beliefs. "[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance." *Oliver*, 466 U.S. at 179. Anyone could have

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[1] Indeed, if Fourth Amendment protection were to be predicated upon whore one felt comfortable enough to eliminate, our search and seizure jurisprudence would be turned on its head

walked onto Vankesteren's property, including a VDGIF agent, and observed his traps. Under our jurisprudence, VDGIF could have stationed agents to surveil Vankesteren's property twenty-four hours a day. *See id.* at 178-81; *McIver*, 186 F.3d at 1125. That the agents chose to use a more resource-efficient surveillance method does not change our Fourth Amendment analysis.

Since Vankesteren had no legitimate expectation of privacy, the agents were free, as on public land, to use video surveillance to capture what any passerby would have been able to observe. As the Supreme Court noted in *Dow Chemical Co. v. United States*, 476 U.S. 227, 238 (1986), when it was assessing the constitutionality of aerial surveillance by the EPA:

> It may well be, as the Government concedes, that surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public, such as satellite technology, might be constitutionally proscribed absent a warrant,. [But t]he mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems.

(internal footnote omitted). Likewise, the placement of a video camera in an open field does not portend the arrival of the Orwellian state that the appellant would have us fear. We are not dealing in this case with a camera that took, for instance, thermal images of Vankesteren's home[2] or that was equipped with an automatic guidance system that allowed it to roam about Vankesteren's property, possibly into protected Fourth Amendment areas. Instead, this camera was

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[2] *See Kyllo v. United States*, 533 U.S. 27 (2001).

in a fixed location, was focused on a limited area of Vankesteren's fields, was activated only by motion, and recorded only during the daylight hours. Essentially, the camera did little more than the agents themselves could have physically done, and its use was therefore not unconstitutional.

B.

Vankesteren makes an additional argument that the government failed to prove that he killed a red-tailed hawk on January 17, In support of this proposition, he notes that Agent Garvis thought the bird killed on that day could have been a red-tailed hawk, a broadwing hawk, or a red-shouldered hawk. Yet, given that we must construe the evidence in the light most favorable to the government, that Agent Garvis discovered two red-tailed hawks at the killing site, and that Vankesteren actually admitted to killing the two hawks, the district court's decision was not in error, let alone clear error.

III.

We hereby reject each of the appellant's contentions and affirm the decision of the district court in full.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

Action No. 2:07cr153

UNITED STATES OF AMERICA,

v.

STEVE VANKESTEREN,
Defendant.

FINAL ORDER

Pursuant to Federal Rule of Criminal Procedure 58(g)(2)(B), this matter comes before the court on defendant Steve Vankesteren's ("defendant") appeal from a decision of the United States Magistrate Judge. On August 7, 2007, defendant was convicted on two counts of taking or possessing a migratory bird without a permit, in violation of 16 U.S.C. § 703 and 50 C.F.R. § 21.11. Defendant initially raised four issues on appeal: (1) the trial court erred in denying a motion to suppress; (2) the government failed to prove that the bird killed on January 17, 2007, was in fact a red-tailed hawk, as alleged in the violation; (3) the government failed to prove that a red-tailed hawk is a migratory bird protected under the Migratory Bird Treaty Act; and (4) the government failed to prove that defendant acted with the requisite *mens rea*.

A hearing was held before the court on December 12, 2007. At the hearing, defendant, through counsel,

conceded that two of the four issues were not viable. Two issues remain for consideration by the court: (1) whether the trial court erred in denying defendant's motion to suppress; and (2) whether the evidence was sufficient to prove that the bird killed on January 17, 2007, was a red-tailed hawk, as alleged in the charges. At the conclusion of the hearing, the court took the matter under advisement. After full review of the record, the court finds no error and AFFIRMS defendant's convictions and the Magistrate Judge's legal conclusions and factual findings.

Regarding defendant's argument that the trial court erred in denying his motion to suppress, the court has reviewed the issue *de novo*. *United States v. Burley*, 416 F.3d 301, 306 (4th Cir. 2005). The court finds no error of law and accordingly affirms the trial court's denial of appellant's motion to suppress.

The court has also reviewed the evidence supporting defendant's conviction for killing a red-tailed hawk on January 17, 2007.[1] The court finds that the evidence presented at trial was sufficient to support defendant's conviction and that the Magistrate Judge's factual findings were not clearly erroneous. Accordingly, defendant's conviction is AFFIRMED.

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[1] In reviewing a challenge to the sufficiency of the evidence, the court reviews the evidence in the light most favorable to the government. *Burley*, 416 F.3d at 306. After reviewing the evidence, the court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

The Clerk is DIRECTED to send a copy of this Final Order to all counsel of record.

IT IS SO ORDERED.

[Stamp]
Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
December 20, 2007

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Criminal Action No. 2:07cr153

UNITED STATES OF AMERICA,
Plaintiff,

v.

STEVE VANKESTEREN,
Defendant.

August 7, 2007

TRANSCRIPT OF PROCEEDINGS

[3] (Hearing commenced at 11:02 a.m.)

THE CLERK: *United States versus Steve Vankesteren*, violation notice is W0784083, and 784084.

Government ready?

MS. STERLING: Government is ready.

Your Honor, before we begin, I just wanted to let the Court know that last week I got a call from Mr. Vankesteren, and he raised an issue with regard to whether or not there was a warrant in this case. At that time I indicated to him it was—I couldn't speak to him because he was unrepresented. However, when I met with the agents on Thursday, I then called him back. I indicated to Mr. Vankesteren that

there was no warrant obtained in this case, and the Government's position was that the warrant wasn't necessary.

I suggested to him, because it was a legal question, if he wanted to agree to continue the case, that I would prepare something in writing that I could send to him, but he indicated he wanted to be here today and have this matter resolved today. And I'm bringing that to the Court's attention simply to let you know, because he's unrepresented, he can't file the motion to suppress so he hasn't raised the issue other than to let me know that he had an issue.

THE COURT: Well—

MS. STERLING: Essentially what this involves, Your [4] Honor, was a video surveillance that was conducted on his property. And that's why the issue arises.

THE COURT: Well, all I know is that if he received this violation notice, and it was handed to him, that that is sufficient to require him to appear here today to answer to the charges.

MS. STERLING: No. That's fine. I'm letting the Court know so that you know that issue is out there

THE COURT: All right.

MS. STERLING:—before we get into the middle of it. I don't know how you want to address it. We can do it in the context of presenting the evidence—it's just something that I want the Court to be aware of because normally if an attorney had been involved, he would have been aware of it before trial. So I'm bringing that up just for the Court's benefit.

THE COURT: All right. Thank you.

Mr. Vankesteren, come on up.

MR. VANKESTEREN: Yes, sir.

THE COURT: Oh, there you are. Come up to the podium. When I say come on up, I'm sorry, you have to stand behind the podium.

MR. VANKESTEREN: I'm sorry. Is that on? Okay.

THE COURT: Let me get you through the basics here. I'm required to do certain things on what's called a first [5] appearance.

MR. VANKESTEREN: Yes, sir.

THE COURT: And it—give you some advice, advise you of your rights and so forth. So just listen to me for a second. I know you're ready to charge into this matter, but I do want to take care of the business first.

MR. VANKESTEREN: Yes, sir.

THE COURT: There are two counts of possession of a—taking possession of a migratory bird without a permit.

These are Class B misdemeanors in this court, and if you are convicted on evidence beyond a reasonable doubt at trial—no trial's been held yet. I haven't taken any evidence—the maximum penalties are six months in jail, a $5,000 fine, and a $10 special assessment would be required.

You have the right to remain silent here today. You have no obligation to make statements at any time in proceedings in this court, and you cannot be compelled to testify. However, if you do say something, what you say can be used against you. You have the right to an attorney to represent you. If you can't afford your own attorney, one can be appointed for you at no charge.

Finally, you have the right to a 30-day continuance. If you say I want the continuance, you get it, because that's a statutory right, and we will set this matter off to a date we can agree on, and you can come back either on your own or [6] with a lawyer to provide a defense.

Ms. Sterling has indicated that you want to raise a preliminary matter, and I'll be happy to hear that, but, again, I want to caution you that you don't have to go forward today, and you could hire an attorney to assist you with whatever might be a complex legal issue in the case. Clear on all that?

MR. VANKESTEREN: Yes, sir.

THE COURT: Okay. Now, how do you want to proceed?

MR. VANKESTEREN: I think I'll go ahead. I know I talked to a lawyer yesterday. The old saying that if you represent yourself in a court, you have a fool for a client. He repeated that to me.

THE COURT: All right.

MR. VANKESTEREN: He thought I was making a big mistake, but, anyhow, maybe I am but—the other thing my father always told me, you only need a lawyer if you were guilty. So I don't know if that's true or not. I'm probably going to find out today or not.

THE COURT: Well, sir, we'll have to see about all of that.

MR. VANKESTEREN: All right.

THE COURT: But let me just say then that I take it you want to enter not guilty pleas to these two charges?

MR. VANKESTEREN: Yes, sir.

THE COURT: All right. Now, is there something you want to raise preliminarily about the manner in which you were—

MR. VANKESTEREN: Yes, sir. I think they violated my Fourth Amendment rights by videotaping me on my private property. They did not secure a warrant, and there was no—by Virginia law, and I have talked to several people, if they do not have a warrant, they still have to notify you that it is going to be on your property. This was my private property. It is one of the most private fields I own. I had the right to expect privacy back there.

It's about a mile from my house. It is at the corner of my farm. I mean, what if I'm out there working or hunting or something, I have to go to the bathroom. I don't want somebody videotaping me. That's a private place for me, and nobody has a right to videotape me there without my permission or without a warrant. So they violated my Fourth Amendment rights.

THE COURT: Do you believe that they came onto your property without your knowledge to videotape you?

MR. VANKESTEREN: Yes, sir.

THE COURT: All right. Let me hear from Ms. Sterling. Why don't you have a seat there.

Ms. Sterling, what were the circumstances under which—first of all, I assume there was a videotape of the [8] act in question?

MS. STERLING: There is a videotape. I can call someone to testify or I can proffer. I don't think there is a dispute as to what happened.

THE COURT: Make your proffer.

MS. STERLING: I'll make the proffer. Your Honor, late in December of '06, there was a report to Virginia Game and Inland Fisheries of a trap that contained a bird that seemed to be suffering. Steve Garvis of Virginia Game and Inland Fisheries did go out to investigate. He found this trap. It was located on Mr. Vankesteren's property. Mr. Vankesteren—and it is not property he owns. I believe he leases it, but he does have an ownership interest in it.

Mr. Garvis was familiar with Mr. Vankesteren. They began an investigation, having found this somewhat of an unusual trap with live pigeons in it, and it was a cage with the steel traps set on top and additional steel traps around the edges.

What—

THE COURT: There was a bird that had been caught in the trap?

MS. STERLING: No. There was actually a pigeon that served as bait within the cage. The officers, believing that the trap had, in fact, been used to, based on the evidence, to trap birds, which is illegally, decided to conduct an [9] investigation by conducting surveillance.

And what they did is they set up at this site, which is in the middle of an open field, nowhere near his—Mr. Vankesteren's personal—not near his home or the curtilage of his home. They set up a video camera, which was motion activated, and they videoed to see who, if anyone, would come out here and what the activity would be with regard to this trap, whether they were, in fact—the trap was being used to trap birds had been reported.

And that's the essence of what the situation is. The surveillance was conducted on his property but it was an open field. And the Government's contention is, and not just our contention, the Supreme Court has made clear that's perfectly okay. It is an open field. The police are allowed to go on there anytime they want without a warrant, if they have some idea that there's criminal activity going on there.

Since they are allowed to be there and they're allowed to observe what's going on, they're also allowed to use video equipment. For the same reason they can do an overhead aerial view, they can use video equipment to videotape activity that they believe to be criminal in nature.

THE COURT: Do you believe that the precedent that is available allows—I'm trying to frame the issue here.

MS. STERLING: Yes, sir.

[10] THE COURT:—allows law enforcement officers, pursuant to an investigation, to enter upon the lands of another without that person's permission to videotape his activities?

MS. STERLING: Yes, sir.

THE COURT: All right. Now, that means that an officer could go on the property of a home in suburbia?

MS. STERLING: No, the officer cannot go in a home.

THE COURT: No, I didn't say in a home. On the property where a house is located.

MS. STERLING: No, he can't.

THE COURT: Why?

MS. STERLING: Because the doctrine is the open field's doctrine. There is a clear distinction between a home and its curtilage, The area around a home where the occupants of the home use for their personal needs, and an open field which is just a piece of property on which there is no private business being conducted. There is a clear distinction. An officer can never go to a home or within the curtilage.

THE COURT: Curtilage.

MS. STERLING: So, no, I'm not talking about that. The officer—the field—the doctrine is called the open field's doctrine. It was first enunciated in *United States versus Hester* but more recently in *Oliver versus United* [11] *States.*

THE COURT: Aliverie?

MS. STERLING: *Oliver*, Your Honor, 466 U.S. 1970. It is a 1984 case. And it says the Fourth Amendment doesn't apply to open fields. The officers just don't need a warrant to go in.

THE COURT: *Oliver versus—*

MS. STERLING: *United States*. And it matters not even that the actions of the officers might constitute a trespass. They're entitled to do that. It's not a Fourth Amendment issue.

THE COURT: And you're confident that's what the law says?

MS. STERLING: I'm very confident about that, Your Honor.

THE COURT: *Oliver versus U.S.*, 466 U.S. 1970, a 1984 case.

MS. STERLING: 1984. There is a subsequent case, *United States versus Dunn* which is 480 U.S. 294,

another 1987 case. And this is a case where the officers went into the open field, and there was a barn, and looked in the barn, and the Court says that's okay. And one of the points that the Court enunciated was that there is no difference between what police observed in an open field, even if it is property, and what they observed in public. There is just no Fourth [12] Amendment protection in an open field.

THE COURT: What's the cite for *U.S. versus Dunn*?

MS. STERLING: 480 U.S. 294, 1987.

THE COURT: Okay. And *Oliver versus U.S.* was a 1984 case?

MS. STERLING: It is, Your Honor. And the original case that sets forth the open field's doctrine is *U.S. versus Hester*, 265 U.S. 57, 1924.

THE COURT: All right. And this is basically the no reasonable expectation of privacy in an open field.

MS. STERLING: No expectation of privacy, warrants not required.

THE COURT: Distinguishing between that kind of circumstance where there's a home and a curtilage, and the curtilage is typically the area that the homeowner uses that's close to the home, and old farms—old home place description and old deeds that used to be the area of the fence within which the home is contained?

MS. STERLING: Exactly. And that is no longer strictly the area within the fence. But there is another case on point, and that's *United States versus Katz*. It's an older case. It's 389 U.S. 347, a '67 case, and that—

THE COURT: Ms. Sterling, you go too fast. *U.S. versus Katz*, K-a-t-z?

MS. STERLING: I'm sorry. K-a-t-z, 389 U.S. 347, [13] 1967.

THE COURT: All right. I got that.

MS. STERLING: And then Hester. Those are the Supreme Court cases that deal with the issue of open fields and the fact that there is no Fourth Amendment protection. There is another U.S. Supreme Court case, *Dow Chemical Company versus U.S.*, 476 U.S. 227, 1986. And this is a case that says if the officer can be there in the open field and observing whatever is going on without a warrant, he can also use technology to view what's going on.

This case was a case where there was an aerial surveillance. But that's what that case stands for. And I'll give you one more because this one is really on point. There is a Ninth Circuit case which is *United States versus McIver*, it is M-c-I-v-e-r. The cite is 186 F.3d 119. It is a Ninth Circuit, 1999, and in this case, they actually used a little surveillance camera. It was a case where they were investigating the growth of marijuana plants, and they used a little surveillance camera, and essentially said what the U.S. Supreme Court said in Dow, you know, if the officer can lawfully be there and observe your activity without a warrant, there is no reason why he can't use technology to observe what he could lawfully observe.

And that's essentially—as I told Mr. Vankesteren, I've researched this. I didn't have a lot of time. I do [14] think I've cited all the major cases, but the Government is confident that there was no Fourth Amendment violation in this case and that there was no problem with the video surveillance.

THE COURT: Now, tell me, make a proffer of the evidence the Government would expect to show at trial with regard to the guilt or innocence of this defendant. What do you got?

MS. STERLING: The evidence will show that after receiving the information, the officer went out. They set up the video camera. The video camera will show two instances where—and it is dated—where a bird, which the officers will identify as a Red-tailed Hawk, is captured within one of the traps.

Mr. Vankesteren removes the bird and kills the bird. And that would be two occasions, on January 17th and the 20th. The officers did subsequently meet with him, and he did—he admitted to the trapping of the birds.

THE COURT: Okay. Did he give any reason based on your information?

MS. STERLING: He indicated on different occasions he was trying to trap mammals; it was an accident. He is—

THE COURT: You would consider—you would argue they were pretextual bases?

MS. STERLING: Predators. He was trying to trap 15] predators on the property.

THE COURT: Red-tailed Hawks are within the purview of the statute that you've cited?

MS. STERLING: Red-tailed Hawks cannot be—migratory game birds, you must have a permit to hunt them or trap them. They are—it is also not permissible to hunt or trap them under Virginia law. But they are—they are not endangered or protected, per se, but you cannot hunt or trap, take or possess them without a permit from the Federal Government be-

cause they're migratory game birds. And the evidence would be that Mr. Vankesteren did not have such a permit.

THE COURT: Now, how would you prove that a Red-tailed Hawk is a migratory game bird? Is it specifically enumerated in the regulations?

MS. STERLING: The—

THE COURT:—officers would testify to that?

MS. STERLING: The federal officers and state officers are very familiar with what are migratory game birds. I don't know. I don't know if there is a list, Your Honor. They would know the answer to that, but I don't think there is any question about that.

THE COURT: All right. Could you prosecute this charge in this court under the state law?

MS. STERLING: Under the state law? Because they're [16] migratory game birds—under state law, you can't hunt or trap migratory game birds.

THE COURT: Yeah. I understand. But you couldn't bring this charge under—solely under state law in this court, could you?

MS. STERLING: Not in this court, no.

THE COURT: That is really what—

MS. STERLING: I understand. I misunderstood your question. No.

THE COURT: That is okay.

MS. STERLING: We are bringing it here because it is a migratory game bird violation.

THE COURT: Okay. And you have the videotape here today?

MS. STERLING: We do, Your Honor. Mr. Vankesteren has been given a copy of the videotape. So he also is familiar with what's on the videotape.

THE COURT: Okay.

MS. STERLING: So—

THE COURT: And have you seen it?

MS. STERLING: I have. I have seen an edited version of—in speaking with Mr. Vankesteren, he wants us to view the entire video.

THE COURT: How long—

MR. VANKESTEREN: I have only watched a few of it [17] anyway really.

MS. STERLING: It is approximately—

THE COURT: Sir, let me just make sure you understand that this is a formal proceeding. You want to address the Court, you stand up.

MR. VANKESTEREN: I'm sorry.

THE COURT: You don't interrupt counsel, and she won't interrupt you.

MR. VANKESTEREN: I'm sorry.

THE COURT: Go ahead.

MS. STERLING: I'm told it is approximately 20 minutes, Your Honor—

THE COURT: All right. That's fine.

MS. STERLING:—if you viewed the whole thing. So that's fine. I was going to ask him to, if he would agree to the edited version, but he wants us to view the whole thing.

THE COURT: Okay. Well, that's really up to me.

MS. STERLING: Yes, sir.

THE COURT: I think. All right. Anything else you want to say?

MS. STERLING: No. That's essentially where we are on the Fourth Amendment issue, and we're ready to proceed.

THE COURT: You're ready to go forward here today?

MS. STERLING: Yes, sir. We will proceed however the Court would like to proceed, but we are.

[18] THE COURT: I appreciate that, Ms. Sterling. Thank you.

Come up to the podium, sir.

All right. Now, here's what I—

MR. VANKESTEREN: Could I just apologize to you. I'm sorry. She put words in my mouth which I didn't say and I'm sorry for saying that.

THE COURT: She's never going to do that Mr. Vankesteren. She's too professional to do that. But you can always stand up and explain, and I will never deny you the opportunity to explain fully.

MR. VANKESTEREN: Okay.

THE COURT: You don't know that because you're a lay person. But if you had an attorney here, your attorney would know that. We will always give you an opportunity to explain.

MR. VANKESTEREN: Okay.

THE COURT: Again, you do not have to go forward here today. Again, these are sophisticated issues involving constitutional cases. Ms. Sterling has cited chapter and verse. I haven't read these cases. I have

no doubt that they say what she says they say, but I want to know if you have any reason to disagree with the—well, I better not get the cart before the horse. You sure you want to go forward today without benefit of counsel?

[19] MR. VANKESTEREN: Yes, sir.

THE COURT: All right. Can you cite any authority from a Supreme Court, or any other court of competent jurisdiction, that would justify your argument that the open field's doctrine does not pertain in this case?

MR. VANKESTEREN: Well, what I've—my attorney, I talked to him at home, and what I found out is, is that I don't have any problem with him walking on my property. That has been proven long time ago. I know that. Game wardens have a right. They actually give the people that don't give their just general lawmakers—I mean, lawmen to go on your property anytime they want to and check things; otherwise, they'd never be able to find any game violations.

But they do not have a right to videotape you because when they leave a videotape there, it tapes everything. It tapes me going to the bathroom. It tapes me doing everything. I have no control over that. They go back in the office and look at me going to the bathroom.

THE COURT: Let me help you with this, Mr. Vankesteren, because one of the things I get to do up here is control the degree to which the arguments are made.

MR. VANKESTEREN: Yes, sir.

THE COURT: I'm trying to frame this issue very narrowly, because you've already made that argu-

ment, and I don't want to hear it again. I don't have the time to hear [20] it again.

MR. VANKESTEREN: All right.

THE COURT: What I'm trying to say to you, sir, is this. Ms. Sterling has cited Supreme Court authority and authority from the Ninth Circuit that stands for the proposition that an officer can go into an open field and leave a camera, a technical surveillance device, and she's reasoning from the cases available, and she cites the *Dow Chemical* case in particular which involves apparently aerial surveillance, which means camera in a plane or a helicopter or some other device.

MR. VANKESTEREN: Yes, sir.

THE COURT: Drone, perhaps. And that's all been approved either in the Ninth Circuit or by the Supreme Court. And my question is very specific. Do you have any Supreme Court authority or authority from any other court of competent jurisdiction that would call into question Ms. Sterling's assertions as to the law? Can you cite a case?

MR. VANKESTEREN: No, sir, I can't cite a case. Well, I can cite her cases. Can I do that?

THE COURT: Well, you can. Have you read them?

MR. VANKESTEREN: I just listened to her as she read them.

[21] THE COURT: Okay. I'll be happy to hear any argument you would like to make to expand on those cases.

MR. VANKESTEREN: Yes, Well, her cases she was talking about in 1964 and 1980, something like that, Video cameras, these motion-type video cameras we-

ren't even available then. They didn't even think about them back in those days.

THE COURT: So you're saying that cases don't say what she says they say?

MR. VANKESTEREN: I agree that they have a right to walk on my property, but there is nothing in there about video cameras at all because they didn't even have video cameras back then. How could they address something they didn't even know about back then?

THE COURT: All right. Anything else, sir?

MR. VANKESTEREN: Um, let's see. She said a couple things. I mean, is it all right for me to counteract what she says?

THE COURT: Sure. I'll be happy to hear you.

MR. VANKESTEREN: Well, she said there was no business, no private business going on in that field. Well, I don't know what farming is. That's a private business. That is what I do in that field. I'm a farmer. She said that's one of the reasons that they let you go on.

The other thing, she didn't say anything about the marijuana patch, whose property that was on. I mean, they find a lot of marijuana on the Eastern Shore. It is never on [22] your own property. You'd be stupid to do that. You go on somebody else's property to put it on then you have a right to go on somebody else's property. You don't have a right to go on my property. And she never mentioned that it was on somebody's property that was growing the marijuana.

THE COURT: All right, sir. Anything else?

MR. VANKESTEREN: Let's see. She put in my mouth something that I said that I wanted to see that today or something like that.

THE COURT: Well, what she suggested was that she understood that you wanted, if we went forward today beyond your motion to suppress, and I took evidence in the case, she wanted—she suggested that you wanted the Court to see the whole 20-minute version of the video—

MR. VANKESTEREN: That's correct.

THE COURT:—and not just the edited version.

MR. VANKESTEREN: Okay. I misunderstood, then. That's correct. Thank you.

THE COURT: So you do want to see the whole 20 minutes if we go forward?

MR. VANKESTEREN: Yes, sir.

THE COURT: All right.

MS. STERLING: I just want to address the issues so that you understand.

THE COURT: Yeah.

[23] MS. STERLING: Your Honor, the case involving the video cameras, the in-ground surveillance, that is a 1999 case from the Ninth Circuit, and it actually occurred in a national park. But the argument is still the same because under *Dunn* it makes no difference, as long as it's an open field and it is not a camera directed at a tent or anyplace where the person expects privacy, the camera is okay.

And I don't know if I mentioned this factually but the area in which the camera was pointed was a very small area. It was a directly at the trap itself and—

you might—you will see from the film, you can see persons coming back and forth, but it is very specific. It does not cover a wide range. It was set up to do just the specific task of monitoring what was going on in that trap and who, if anyone, was coming around. So the officers really designed it in such a way as to minimize the intrusion on the property owner.

THE COURT: All right. My disposition at this point is I'm going to take the motion to suppress under advisement pending the consideration of all of the evidence in the case. If we are going to go forward here today, it's the Government's burden to prove the charge beyond a reasonable doubt, and you can call your first witness.

MS. STERLING: The Government calls Mr. Garvis.

THE COURT: All right, Mr. Garvis. Come on up and [24] be sworn.

(Witness was sworn.)

THE COURT: All right. Take the witness stand. I'm going to take one minute before we get started.

(Pause)

MS. STERLING: Your Honor, if I might, if you have a copy of the cases that we cited, if the Court can look at my copies rather than—I'm sorry I didn't make extra copies, but I do have them all within a folder if the Court would like to—

THE COURT: In fairness, I'm just going to have my law clerk take a look at it online, but I need that piece of paper back as soon as you can.

All right. We have Mr. Garvis in the witness chair, and he's been sworn, and Ms. Sterling, who's the attorney for the Government, is about to examine him.

Before we go any further, I've advised Mr. Vankesteren of his rights, and his right to counsel, and his right to a continuance. I note that Mr. Vankesteren has signed what's called an acknowledgement of certain rights; is that right, sir?

MR. VANKESTEREN: Yes, sir.

THE COURT: All right. And that's in the file. I have two violation notices here in the file either, as well, both stating the charge. And, Mr. Vankesteren, what I want to tell you is that you have the right to cross-examine this [25] witness after Ms. Sterling concludes her direct examination, and if you choose to do so, you'll do it from the podium, and I'll explain all the other rules that obtain, but when you cross, you're basically asking questions about his testimony, and you can ask him leading questions. You can't argue the case—

MR. VANKESTEREN: Thank you.

THE COURT:—at that point. You are simply devoting yourself to cross-examination of him based on his testimony. Go ahead, Ms. Sterling.

STEVEN GARVIS, called by the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. STERLING:

Q. If you would, sir, please state your name for the Court. A. Sergeant Steven Garvis.

Q. And, Mr. Garvis, how are you employed?

A. I'm employed as a Virginia game warden or conservation police officer with the Department of Game and Inland Fisheries.

Q. All right. How long have you been employed in that capacity?

A. Thirteen years.

Q. Okay. And what do your duties involve?

A. My duties involve to patrol and detect natural resource [26] violations in the Commonwealth of Virginia, and my specific patrol district is the Eastern Shore.

Q. Okay. Did you become involved in an investigation in late January of '06, sir—late December '06/ early January '07 that brings you to court today?

A. Yes, I did.

Q. Okay. Could you tell the Court how you became involved in this investigation?

A. The Department of Game and Inland Fisheries dispatcher received a violation—a call for a possible violation. The call was reported to me and another officer that there was a strange trap and cage with a bird in it, and it was surrounded by, looked like, other traps, and that the caller believed that there was some kind of protected bird in one of the traps, and it was suffering.

Q. When you say protected birds, what do you mean by that?

A. Well, that's basically what the call was. By protected bird, I perceived that to be some type of bird that there was no legal hunting season on, a hawk, an owl, a songbird that didn't specify—the dispatcher didn't specify as to a species.

Q. Okay. So after— did you receive an indication of where this trap was located?

A. They gave a location off of Acorn Road in Accomack County.

[27] Q. Okay. And that's on the Eastern Shore?

A. That is.

Q. And within the Eastern District of Virginia?

A. That is.

Q. So what did you do based on that information?

A. Myself and another officer responded to that location and found a cage, rather, I guess a couple foot, foot high or foot and a half high by maybe two feet that contained one live pigeon and one dead pigeon completely enclosed. Around that enclosure, there were four foot traps on the ground, uncovered and set.

Q. What do you mean by a foot trap?

A. A foot trap or a leghold trap. It is a device used in the fur industry to capture and restrain fur-bearing mammals at that location until the trapper arrives to remove them from the trap. There was four set on the ground, exposed, uncovered and set so that they're operational, and one was set on top of the cage.

Q. Operational meaning they were—

A. Operational, that if the activations of the pan or the trigger device was stepped on, the jaws would come up and close on the leg and restrain the whatever was—

Q. Whatever was in the trap?

A.—at that location.

THE COURT: So there were a total of five foot [28] traps?

THE WITNESS: Yes, sir.

THE COURT: Okay. Go ahead.

BY MS. STERLING:

Q. Go ahead.

A. Um, you know, we photographed that. One of the traps had fresh and uncoagulated blood still on it. There was no—we could not locate any other fresh-killed bird. In the immediate area, I did see carcasses of possums and fox—not piles of them, like one or two

that were discarded into the hedgerow where this trap was set alongside.

We photographed that, and left the area. I was worried at that point that possibly the suspect would recognize we were in a marked vehicle. One thing to note was this trap that—this trap set, this cage with the bird in it, the pigeon in it was exact setup that I located on a piece of property owned by Mr. Vankesteren, who is seated at the defendant's table, in 2003.

Q. Was this a different piece of property?

A. This is a different location. I found this location—the first set. So based on that I developed a suspect that was probably going to be Mr. Steve Vankesteren who was monitoring and maintaining this trap.

Q. Was this an unusual type of a trap?

A. It is. It is based on the fact that its very nature, the [29] way it's set, is extremely nonselective in that it would catch any predator that is attracted to that live moving bait.

Q. Okay.

A. It would catch particularly birds of prey. It will catch hawks, it will catch owls, it will catch Farrell cats. Whatever hunting predator comes to that area and is attracted, it will catch that. Whereas, traditionally, trappers for fur-bearing mammals would use a more selective type of set that would involve—

Q. Is it—I'm sorry, is it a trap that you don't see very often?

A. The only one I have ever seen other than pictures on the internet for hawk trapping has been in 2003 on Mr. Vankesteren's farm.

Q. At Mr. Vankesteren's farm. So after you went out to the site, did you determine whose property it was, the property where the trap was?

A. Not at that time. What I did at that time was I just returned on subsequent dates. I returned—the first call came in on 12-29-06. I returned at 5:30 in the morning on 12-30, the next morning, to see if anything was caught, and at that point I observed the trap that was set on top of the cage to have been sprung. There was no animals were captured in the trap when I got there.

Later that day I went up and I created, if you will, a track trap or something that would indicate whether somebody came and left from the field. And at 1730 that afternoon on the 30th, I went back, drove down the road again, and the indications to me, based on my training, experience with tracking, is that no vehicle had driven and entered that field.

On the 31st at 1:30 in the afternoon, I drove down Acorn Road, a public roadway, and the track trap indicated that a vehicle had entered that field. And I did not visit the actual trap site at that time, working by myself.

On January 6th at 1800 hours, I checked the trap site. There were tire tracks again indicating that a vehicle had entered and exited the field, and the vehicle had stopped in close proximity to the trap site and foot track evidence indicated somebody exited the vehicle and moved in the direction of where the trap was located on the 6th. All traps were set, and the pigeon that was alive on the 29th was now dead in the cage.

On the 9th of January at 1800 hours, I returned, checked the trap site again. All the traps were set again, and there was a new or a live pigeon had been placed in the cage to act as bait. Sometime between the 9th of January and the 11th, I made a phone call

to our special operations division up in—working by myself, and this was not an area [31] I could cover by myself, so I contacted our special operations division and spoke with Agent Shires and Agnese about setting up one of their surveillance cameras at this trap location.

On the 11th of January '07, I assisted in dropping off the special operations unit to set up the video surveillance camera.

Q. Okay. Stop right there for just one second. I want to show you a number of photographs. The three separate sheets here that have been marked for identification purposes as 1-A, 1-B and 1-C, if you would take a look at them collectively and identify the photographs?

THE COURT: All right. I note that these photographs have been shown to the defendant.

THE WITNESS: The first page of—these first four photographs, five photographs were taken on December 29th. This was the condition of the trap set, the cage with the pigeon, and the surrounding foot traps or leghold traps. When we arrived on the 29th, where it is set in proximity to the field, and one shows the fresh, uncoagulated blood on one of the reset foot traps.

BY MS. STERLING:

Q. Okay. And that last photograph, that very last photograph, does that—can you tell us what that is?

A. That is an overview. That's the trap set along the 32] hedgerow on the farm off Acorn Road and the—well, yeah. That's basically an overview of the trap location and proximity to the field and the soybean edge.

MS. STERLING: Your Honor, we would move to introduce what's been marked as Government's Exhibit Number—it is 1 but it is 1-A, B and C to mark the three pages of photographs.

THE COURT: All right. Let me see them. Any objection?

MR. VANKESTEREN: No, sir.

THE COURT: All right. No objection. Let me have just a quick look.

All right. Those documents, Government's 1-A, 1-B and 1-C will be received into evidence.

(The photographs were received in evidence and marked as Government's Exhibit No. 1-A, B & C.)

MS. STERLING: Thank you, Your Honor.

BY MS. STERLING:

Q. So, Mr. Garvis, you indicated you went out with the special unit operation to set up the video cameras; is that correct?

A. Yeah. I dropped them off. They did all the—I never handled any of the camera equipment. I just dropped them off so they could—

Q. Because that is really not within your purview. That is [33] something you don't normally do?

A. No. That's—

Q. Do you know how long the video camera was there? Did you come back when it was recovered?

A. Yes. The next time I was on the property was on the 25th—actually, January 24th I was notified by Agent Agnese that he had video footage of the suspect, Mr. Vankesteren, had captured and killed two hawks, and he described the suspect being out of the video frame for approximately two minutes. He indicated which direction he left the viewing frame from,

and could I see if I could locate the hawks. He felt that he left the video view carrying the hawks.

When he returned back into view again, he was not carrying them so Agent Agnese felt that they were disposed somewhere along that hedgerow that I was pictured standing on in one of the photographs.

On January 25th, I got assistance from Special Agent Wade with the Virginia State Police to drop me off. I went to the trap site. I walked approximately 45 seconds down the hedgerow, entered the hedgerow, started looking, and immediately found one immature Red-tailed Hawk that had severe head damage, looked like it had been beaten in the head, which was consistent with what was on the videotape.

I found one in the hedgerow, and immediately next to it in the flooded field drainage ditch was the second [34] immature Red-tailed floating in the ditch. Those I recovered and I photographed, and I did my final photographs on the next day, the 26th.

Q. All right. So on the date—you received a call from Agent Agnese on the 24th, and the 25th is when you went out there—

A. That's correct.

Q.—looking for the bird that he had identified from the videotape; is that correct?

A. That is correct.

Q. Let me show you what's been marked as Government's Exhibit 2-A, B and C, and ask if you can identify these.

THE COURT: All right. The defendant has viewed Government's 2-A, B and C, and they are now with the witness.

THE WITNESS: Yes. These are the photographs I took on January 25th. One is the overview of the condition of the trap set with the cage on the day I arrived.

BY MS. STERLING:

Q. That would be January the 25th?
A. That would be January the 25th.
Q. Yes, sir.
A. If memory serves me correctly, from the photographs, all the traps were either sprung, one was turned over upside down. The one close-up photograph of a foot trap shows some feathers in the trap, indicating that it looked like a Turkey [35] Vulture had been snapped. Feathers were in the trap, photographed that. And the other pictures show the location of the two hawks in the hedgerow. They are close-up photographs.

MR. VANKESTEREN: Am I allowed to have him repeat one thing or is that not in order?

THE COURT: If you want to address the Court, stand up so I know that you want to talk, and I can hear you better.

MR. VANKESTEREN: Yes, sir.

THE COURT: Now, what is it you want?

MR. VANKESTEREN: I missed the date when he said he came in and all the traps were sprung. I didn't catch the date.

THE COURT: What was that date?

THE WITNESS: It was January 25th.

THE COURT: January 25th. All right. Go ahead.

THE WITNESS: So the first page is a close-up of a foot trap containing feathers, what we believe to be is a Turkey Vulture. The second page is a close-up of

both the Hawks, one and two, before I moved them from the hedgerow. And on the third page is both of the hawks together, photograph with the head trauma, side by side, and an overview of the trap site that night when I arrived, or that evening.

[36] BY MS. STERLING:

Q. Okay. And where were the hawks found in relation to where the trap was, how far away?

A. It was consistent with what Agent Agnese described to me—Agnese described to me as approximately a minute out of view. I just guesstimated as I walked from the trap site approximately.

Q. Did he give you a proximate location?

A. He said—Agent Agnese said he walked out of the camera view. He was gone about a minute, and then he shows back up, and he doesn't have the hawks with him. So those trap—he felt they were thrown into the hedgerow somewhere along that.

Q. What was the condition of these birds when you recovered them?

A. The birds were nondecomposed. Any scavenging critters, fox, possums or something hadn't located them yet. They hadn't been eaten on. The head showed severe blunt trauma to them. Identified them as immature Red-tailed Hawks because of the brown belly band across them.

Q. How are you able to identify them?

A. The field marking of a Red-tailed Hawk is a brown feather band across its breast. Immature birds don't have the red tail yet. So the field marking to identify the Red-tailed Hawk species is that brown—almost belt of brown feathers on its white breast feather.

Q. And have you had training, experience in your job as far as identification of migratory game birds?

A. Yes. Both on the job and personally, I'm an avid bird watcher. Except for the confusing fowl Warblers, I'm very good at all the water fowl species and birds of prey and most songbirds and thus received training as a game warden.

Q. Are you familiar specifically with the Red-tailed Hawk?

A. I am.

Q. And are they native to the Eastern Shore area?

A. They are.

Q. And are they migratory—how do you know that they are migratory game birds?

A. They are listed—well, I don't know if they are listed specifically by species under the Migratory Bird Act. I believe they are. However, they are a migratory bird that does migrate down the eastern seaboard, particularly staging on the Eastern Shore before they cross the bay. Oftentimes they do migrate to the Eastern Shore and stay there for the winter.

Q. But as a Virginia game warden you do receive training in identification of species that are native to this part of Virginia; is that correct?

A. That's correct.

Q. What specific kind of training have you had?

A. Well, we train in the academy on the species of Virginia, [38] as a Virginia game warden is expected that we are clearly able to identify what is native in Virginia, and we are also trained in what evasive species. We are also trained in how the species are broken down into furbearer and upland game animals, big game animals, and nuisance species. So we should be able to differentiate protected species like the Red-tailed Hawk, where there is no season or bag limit set by the state or the Federal Government.

Q. And there are no—under both state and federal law, you cannot hunt these birds without a permit; is that correct?

A. That is correct. It would require a permit from the Fish & Wildlife Service if you had a justifiable reason to hunt these birds.

Q. In your 14 years of experience as a Virginia game warden, have you come across Red-tailed Hawks with any frequency?

A. Yeah. I do. I see them on a daily basis. I've also had calls from, trappers that have inadvertently caught Red-tailed Hawks in the traps, very rarely. And in instances like that, I respond to it, deal with it on a case-by-case basis. The animals, the hawk is removed from the trap. I take it to a qualified vet to see the extent of the injuries, if it's still alive. The vet deems that it can be rehabbed, it is taken to a licensed rehabber, and we head back into the wild. And if the vet deems that the injuries are too extensive, then they will take care of it—

[39] MS. STERLING: Your Honor, for purposes of the record, I would like to ask that Mr. Garvis be qualified as an expert in the identification of migratory game birds, specifically the Red-tailed Hawk.

THE COURT: Mr. Vankesteren, do you want to be heard on the motion to qualify this witness as an expert?

MR. VANKESTEREN: Sure. I've known him. I'm sure he probably knows more about the trapping of hawks than I ever will. I don't doubt that for a minute.

THE COURT: All right. Thank you, sir.

Okay. Then the— based on the testimony which indicates considerable field experience, considerable

experience in the field with Red-tailed Hawks in particular, and the training that he has received from the academy here in connection with his duties as a game warden, and given the fact that there is no objection, I find that the witness is an expert in the identification of migratory birds.

BY MS. STERLING:

Q. And there is no question in your mind as to what these birds that you found on the property on the 25th were?

A. No question.

THE COURT: May I ask one question before you finish?

MS. STERLING: Sure.

BY THE COURT:

[40] Q. Is there a circumstance under which an individual could obtain a permit?

A. There is only one that I know of, and I'm—I'm not sure it is even in Virginia. The USDA Wildlife Services handles permits on removing protected species. Oftentimes their own agents, the Wildlife Service personnel will do things like that. There is one instance that was related to—that was—came to my attention by one of the Wildlife Service agents where a man was able to directly articulate that he was raising valuable racing pigeons as a main part of his income, and he was given a permit to kill the hawks that were killing his pigeons.

Q. Who issues these permits?

A. It would be under the USDA.

THE COURT: Do you have any other questions based on the Court's questions?

MS. STERLING: I'm sorry?

THE COURT: I was asking him about who issues the permits, and he explained that the USDA issues the permits.

MS. STERLING: Right.

THE COURT: I was asking him whether or not you—I'm asking you whether you have any other questions based on the Court's questions?

MS. STERLING: No. Thank you.

THE COURT: All right. Go ahead. Anything else?

BY MS. STERLING:

Q. Let me show you what's been marked as Government's Exhibit—

THE COURT: Let me see those, First of all—

MS. STERLING: 3-A, B and C.

THE COURT:—before you go on, Just a second. Ms. Sterling, I'm going to ask the defendant first, any objection to the admission of Government's 2-A, B and C?

MR. VANKESTEREN: Yes, sir. The pictures of the hawk, I don't have any idea. I mean, I'm sure if you went through my hedgerow, you could find all kinds of dead stuff. I don't know whether—I mean, I had a dead warbler float in my irrigation pipes. That doesn't mean I put it in there. I don't have any idea what is in my hedgerow and what isn't.

So the pictures of hawks, I don't know where they came from, and I don't know anything about it.

THE COURT: All right, sir. The officer testified that he took his pictures on a particular date, January 25th, I think is the date.

MS. STERLING: Yes, sir.

THE COURT: Based on information that was provided by officer—Agent Agnese who described the actions of a particular individual from his view of a videotape that was taken on the property in question, in the vicinity of the traps in question—

[42] MR. VANKESTEREN: Can I raise—

THE COURT: Excuse me, sir. When I talk—when I talk, you listen. When you talk, I listen. Don't interrupt me again. I am admonishing you, we are going to handle this very fairly but very slowly and carefully.

MR. VANKESTEREN: All right.

THE COURT: Now, he says that these photographs are the photographs that he took based on what he saw on that date at the site in question. Why would they not be admissible, admissible, and then you can cross-examine on any other arguments you want to make. I'm just asking if you have an argument, I'd like to hear it.

MR. VANKESTEREN: Because I find dead animals all the time on my property. They fly in the trees, they fly in the telephone wires. I don't know. I don't know how they got there or what the circumstances. They were not in the trap. That is the only thing I know for sure. He said that himself.

THE COURT: All right, sir. So you don't have any objection to the accuracy of the photographs that he took, you're just challenging whether the evidence—you're challenging the inferences that the Court might draw from the photographs?

MR. VANKESTEREN: Yes, sir.

THE COURT: Okay. I overrule your motion, and I'm [43] going to introduce those.

MR. VANKESTEREN: Okay.

THE COURT: What you're essentially raising is an argument regarding inferences that the Court ought to draw from these photographs or ought not to draw from the photographs.

(The photographs were received in evidence and marked as Government's Exhibit Nos. 2-A, B & C.)

THE COURT: All right. Go ahead, Ms. Sterling.

BY MS. STERLING:

Q. I handed the defendant what's been marked Government's Exhibit 3-A, B and C, another photograph I'm going to show the defendant—show the witness and ask the witness to identify.

THE COURT: All right. Government 3-A, B and C have been shown to the defendant. They are now with the witness.

THE WITNESS: These are additional photographs took on the 26th of January. I was a little worried that the light, when I took the original photographs, wouldn't be clear. So the very next day I laid the Hawks out, photographed them again showing the trauma to the head. Each hawk individual shows—on the page 1 is the overview of the hawk, and one of the close-ups of the head trauma.

On page 2 there is the close-up of the head trauma on the second hawk. And then on the subsequent picture in [44] the last page are pictures of some lacerations on the foot of the hawk. That was, based on my trapping experience, would indicate that they were in a foot trap or a leghold trap.

BY MS. STERLING:

Q. All right. Are you able to tell from looking at the photos or looking at the birds themselves the extent of damage to the bird insofar as whether they would

be able to survive because of those wounds on their feet from the trap?

A. No. And that's—I never really make that decision. If I can remove the bird live from a trap, I bring it to a qualified veterinarian and let them make the decision through their training and their knowledge on a bird anatomy.

Q. Okay. So it's not something that you as a game warden or as any lay person would be able to tell just from looking at the injury itself; is that correct?

A. Yeah. It is not something that I would feel comfortable making the decision on a protected species like that, that I would take it to a qualified veterinarian and do it pretty routinely there on the shore.

Q. And you've indicated you've had a prior experience where you've removed a bird from a trap or Red-tailed Hawk?

A. Yeah. On several occasions I've recovered injured birds, but specifically not—and I don't remember the exact date. It was within a couple of weeks of that—I recovered these. So I had a local trapper call me, said he had caught a hawk [45] in a trap, and he was worried, what should he do. And I asked him if he'd gotten it out. He said I've already gotten it out. It is in a box.

And at that point I met him. I got the hawk from him, took the box, took it to the vet. That hawk was examined. It was—again, it was an immature Red-tailed. The hawk was examined by the local veterinarian and deemed it was suitable for rehab. It was taken to a local rehabber. I picked it up from the rehab about three to four weeks later and rereleased it again back on the gentleman's property.

Q. Is that your standard procedure when you're contacted regarding, you know, an act—a bird that was accidentally caught?

A. Yes. I work with—I take it on a case-by-case basis, and, you know, if the bird can be rehabbed, great. But if there's charges that would be appropriate, then they would be filed. And if not, then they aren't.

Q. All right. Now, the birds that are represented in those photographs, specifically Government's Exhibit Number 3, what did you do with them after you photographed them?

A. After I photographed them, we had—you know, they are kept—sent into evidence. I contacted Agent Rolince, and since he was going to be involved in this case, I transferred those birds to his custody.

Q. And Agent Rolince is the U.S. Fish and Wildlife [46] Association; is that correct?

A. Yes, that's correct.

Q. And did you keep the birds in your exclusive possession and control until you transferred them?

A. Yes.

Q. While I'm at this point, ask you a little bit about the trap and trapping, And specifically can you tell me what your background is in trapping animals or birds?

A. I can. Um, I started trapping at age 14. I continued that pretty much most of my adult life. 1987 I attended the Fur Takes of America Trapper's College, which is a week long training. At the time it was held in Lagrange, Indiana. It was put on by the top known industry trappers in the nation for Woodstream Corporation, the night of agents from USDA that their life—livelihood is trapping nuisance predators, and I received instruction in trapping specifically using snares and foot traps on all the land-based predators and water animals, coyotes, fox, both red and gray,

raccoons, possums, skunks, mink, muskrat, otter, all the known money furbearers, just trapping techniques. Except the trapping techniques, we went over ethics. We talked about just the whole range of trapping techniques that are commonly practiced in North America.

Q. Okay. And since that occasion when you had that training, did you work with trappers or do any trapping?

[47] A. Yes. I trapped extensively up until '94. As a matter of fact, after I received that training, I moved out to the midwest in the State of Missouri working for their conservation department, and as a recreational time I trapped coyotes and bobcats and other furbearers in that midwest.

Since taking the job with Virginia Game and Fish, up until this past year, I've not set traps for fur—or however I've worked extensive trapping enforcement and I'm also the instructor for the Virginia Department of Game Training Academy on trapping enforcement and trapping techniques for new officers coming into the field.

Q. Okay. And when you talk about trapping, are you talking about trapping for predators as opposed to—we are not talking about trapping for profit or to sell skins—

A. Yeah. The training, the fur industry is for in trapping and selling fur. It also has a spin-off into animal damage control where there's a specific need for help to be hired to remove specific problem animals, be it coyotes in western ranches or even western Virginia, to raccoons raiding trash cans in suburban—

Q. So trapping is trapping no matter the reason you're doing it for, It is all pretty much the same?

A. It would be different whether you are getting paid for a specific service to remove a problem animal or if you're being paid because you're selling the furs on the [48] international market.

MS. STERLING: Okay. Your Honor, I would like to have Mr. Garvis qualified as an expert in the area of trapping.

THE COURT: Defendant want to be heard on this?

MR. VANKESTEREN: I've said before, he knows a lot more about trapping than I ever—I don't have any problem at all with any about trapping.

THE COURT: All right. Based on the information before me, particularly the education that the defendant has received, his activities as a private citizen in trapping, his activities as an agent in connection with trapping matters within his jurisdiction, and in connection with—and particularly taking into account that he's trained as well as having been trained, I find that he's an expert in trapping. Go ahead.

MS. STERLING: Thank you, Your Honor.

BY MS. STERLING:

Q. Mr. Garvis, you testified previously that the trap that you encountered on—on this occasion was unusual. And can you tell us what's unusual about that type of trap?

A. Well, the main thing that makes this particular set unusual is it's very nonselect. And by that I mean it is not species specific. If somebody was trapping predators to help the quail population because he's worried that limited—in [49] a predator activity will hurt the quail population, they are just going to target specifically the fox, red and grays, raccoons, possums, that type of forbearer, which are legally al-

lowed to be trapped. And there are certain types of sets that would be employed to make those species specific, and by that I mean there is not an exposed, movable live bait or even an exposed dead bait that had any visual type of attraction, birds of prey, hunt, except for vultures hunt almost exclusively by sight.

Red tails soar the open fields looking for movement or prey or stationary, dead carrying it, that is sitting there, that they go down to feed on. The fox and other land-based predators hunt the same way. They also utilize their smell sense or olfactory senses to a greater degree. Therefore, a trapper that wants to definitely stay away from accidentally catching hawks is not going to use an exposed bait. That is something that trapping publications and trapper training really emphasize because you just don't want to have these protected species caught. I believe in some of the western states it is actually state law because the attraction of Golden Eagles to visually exposed baits and the high instances of catching those, the state have deemed that they are going to make laws so that the trappers don't use those. Out west it is probably particularly important because it is such open country that these birds can see such [50] long range.

I have talked to the local trapper's association, I think in about 2004, I believe. It might have been 2005. I met with the local group. We talked about—I guess it was an opportunity for local trappers to talk face-to-face with the game warden, and say, what if I caught this or what if I put my handgun in my coat, is that considered—it was their chance to ask me specific law questions that I can address that so that we can avoid having to address it in the field when I'm in an enforcement capacity. And Mr. Vankesteren was at one or two of those meetings that I attended.

Q. In which you were providing the training or answering questions for—

A. Yeah. I really wasn't training. I would say more question and answer. But it was very informal. I didn't show up in uniform. I know most of them, and I was asked to come there just to ask specific questions on how to get a hold of a game warden if they have problems. And one of the things we were talking about, too, was the trapper harassment. You know, what if somebody was messing with my trap line, how do I get a hold of you and what rights do I have.

So we covered a wide range of topics on that, but one of the things was to establish was that if something happens that would constitute a violation of the law, that [51] you need to contact me and well work with it on an individual case-by-case basis, and I make no promises that they would not be charged but I did distinguish that a violation that the person called me personally or called our dispatcher and notified that they have a problem would be dealt with on a different level than a violation that I discovered myself that had any possible concealment where somebody, you know, committed an act and tried to hide it.

Q. So in your opinion as an expert in trapping, if you were interested or if a person were interested in solely trapping mammals, not birds, would they use the type of trap that you found on the property, the trap in question?

A. No, I definitely would not.

Q. And then in your expert opinion, what is it that that trap is designed to catch?

A. That trap right there will catch any predator that is hunting along that hedgerow, be it a bird of prey, hawks, owls, eagles or any land-based predator

that walks along, be it a possum or a fox or a house cat or whatever.

Whatever's in that area is going to be attracted to that live pigeon flapping in the cage, and the way the traps are set uncovered, that even if it avoids one or two of the traps, it would probably inadvertently back into one of the other ones. It is surrounded and set in a manner that it is just going to catch whatever comes on that—and it will [52] miss a lot, too, But if it gets there, a chance of it getting caught is fairly good.

Q. Right. And insofar as I've indicated that you've spoken to this local group up on the Eastern Shore in Accomack County at the local trapper's association meetings which the defendant has attended at some point—

MR. VANKESTEREN: I object.

THE COURT: What is your objection, sir?

MR. VANKESTEREN: He came to a couple meetings that I unfortunately missed. I only came for one meeting, the last one, and he did not talk about—the whole theory of that meeting was how to catch raccoons and leave them in a box trap. That was the only thing—I missed the other meetings, but I was at the very last meeting. I missed all this other stuff he is talking about.

THE COURT: All right. That's not an objection to his testimony. It is basically an indication you want to testify in a different way, and I'd have to decide whose testimony I would credit, but I will excuse you for the interruption because you lack the experience.

I'm overruling that objection to the degree it was an objection. Go ahead. Let's wrap this up.

MS. STERLING: I'm going to rephrase the question, too.

BY MS. STERLING:

[53] Q. As an expert in trapping, is it ever advisable when a trapper has accidentally caught a bird to then kill the bird?

A. My advice to anybody that has asked me that question is call me and we'll work with it together.

Q. Okay. So under all circumstances if there is some type of an accident involving something that shouldn't have been trapped, the parties are advised to call the authorities?

A. That's correct.

Q. All right. Now, let me show you what I'm going to mark as Government's Exhibit Number 4. And in your job as a game warden and also as a trapper, have you consulted learned treatise or written materials regarding how to trap mammals?

A. Yes.

Q. Let me show you what's been marked as Government's Exhibit Number 4.

MR. VANKESTEREN: I saw that. I was looking at that earlier. I wish I had gotten a copy of that myself.

THE COURT: All right. Government Number 4 has been shown to the defendant. Now it may be shown to the witness. You have moved the admission of Government's 3-A, B and C; is that correct, Ms. Sterling?

MS. STERLING: Yes, Your Honor. The Government would move to admit those.

THE COURT: All right. Any objection to the admission of Government 3-A, B and C?

MR. VANKESTEREN: No, sir.

THE COURT: All right. Government 3-A, B and C will be admitted.

(The photographs were received in evidence and marked as Government's Exhibit No. 3-A, B & C.)

BY MS. STERLING:

Q. If you could identify what's been marked as Government's Exhibit Number 4.

A. This is a Virginia Trapper's Manual. If I'm correct, it probably hasn't actually been in publication for a while, but the information in this publication, particularly on pages 35 and 36, which deals with land sets or land predator sets, is a good example of any trapping publication that's put out would have this type of set that is recommended and used to effectively catch all the land-based predators.

Q. And what type of setup would that be?

A. It would consist of a concealed type bait or some type of scent acting as bait to key on the olfactory, the smell senses, and a covered, concealed foot or leghold trap that would not be really visually detected by the mammal approaching the set. There would be no visual cues that would key to raptors, such as movement. This would key into the visual hunting cues that a land predator would, like, disturb dirt, a hole in the ground to look like a mouse hole, something that a canine predator or a fox or a raccoon or a [55] possum would deem that would cue their hunting, where a hawk or a bird of prey would ignore something like fresh dirt.

Q. And that document that you're looking at which is Government's Exhibit Number 4, who has published that?

A. This is actually was published by the Department of Game and Inland Fisheries in Virginia. I

don't know when the last one was put out. I don't believe—

Q. And it is a manual with regard to trapping and the types of traps that can be used?

A. Yes. It covers management species identification and, habits and recommended trappings.

Q. In that manual is there any indication of the type of trap that you observed on this occasion, the above-ground trap with the live bird inside?

A. No.

Q. And that's not indicated as a trap to be used for mammals; is that correct?

A. No. That's not in any trapping publication I've seen put out to furbearer trappers.

MS. STERLING: Your Honor, Government would move to introduce what's been marked as Government's Exhibit Number 4 as a learned treatise on trapping.

THE COURT: Does the defendant have any objection to the admission of this document?

MR. VANKESTEREN: Could I just make a statement [56] about that? I've never seen that book before, so, I mean, it doesn't have any bearing on me. If I could have seen that, it might have helped me, but I've never seen that book or the book he's talking about, I've never seen them, so, I mean, how does that bear on me? Am I supposed to know something that is in that book that I've never seen before?

THE COURT: Sir, it has been offered as a learned treatise, and—

MR. VANKESTEREN: Never been offered me. When I—

THE COURT: Excuse me. I'm sorry, but you interrupted me again, and I'm going to make my ruling.

Stand up. It's been offered as a learned treatise. No one has suggested that you have seen it, in this testimony. As a learned treatise, the Court can consider it in terms of informing itself as to the technical matters relating to these traps, what they were intended to be used for, what they would be customarily used for, Whether or not they could be expected to trap creatures ranging from land mammals to birds of prey, and how the traps might affect the creatures. That's why it's been offered.

Correct, Ms. Sterling?

MS. STERLING: Yes, sir.

THE COURT: On that basis, I'm going to admit it as a learned treatise. Your objection, if I heard one, is overruled. Have a seat.

[57] Okay. Go ahead. Any other questions of this witness?

MS. STERLING: I do, Your Honor.

(The Virginia Trapper's Manual was received in evidence and marked as Government's Exhibit No. 4.)

BY MS. STERLING:

Q. Now, Mr. Garvis, did there come a time where you observed the surveillance videotape that was taken at—I'm sorry. I had one question before that. At what point did you determine the ownership of the property or of Mr. Vankesteren's interest in the property?

A. I determined the actual ownership through the Accomack courthouse. It was just a couple weeks ago I found out who actually owns the property. I just had knowledge that Mr. Vankesteren had leased or hunted in and amongst that area.

Q. And that's because of your living and working in the—

A. Yeah, working—

Q.—in the Accomack County area? Okay. And did there come a time when you did view the surveillance tape?

A. I did. It was the morning of the 30th when we all came together to pull the camera setup and seize the traps and everything as evidence, and I was able to view the tape that showed the defendant, who I can identify from the tape, and viewed the actual him killing two hawks on the tape, and then it was consistent with what Agent Agnese told me.

[58] THE COURT: This is January 30th of 2007?

THE WITNESS: That's correct.

THE COURT: All right. Go ahead.

BY MS. STERLING:

Q. And you said "we." Who do you mean by "we"?

A. It was myself, Special Agent Rolince, Agent Agnese and Agent Shires were together to wrap this up.

MS. STERLING: Your Honor, at this point I would like to show this witness the videotape. I do have Agent Agnese here. He will testify as to the setup of the video camera and the equipment and so forth, but at this point I would like to just mark the tape for identification purposes as Exhibit Number 5 and allow this witness to view the tape.

THE COURT: All right. Government Number 5, we'll mark it for identification.

MS. STERLING: And as indicated Mr. Vankesteren was given a copy of the tape prior to court so he is familiar with it.

THE COURT: Mr. Vankesteren, you have a copy of this tape; is that right?

MR. VANKESTEREN: Yes, sir.

THE COURT: And, Ms. Sterling, you propose to show this videotape on the screen here so the Court can look at it while the witness is in the stand?

MS. STERLING: Yes, sir. If I can get someone to [59] help with the equipment.

THE COURT: All right. Come on up. Let's have a look.

MS. STERLING: He wants to view the whole tape. And while he's setting that up, you indicated, Mr. Garvis—

THE COURT: That is fine. Don't turn it too far away from the defendant.

BY MS. STERLING:

Q. You were able to identify the defendant in the videotape. And how were you able to do that?

A. Well, I'm familiar with Mr. Vankesteren, and I could recognize him from the tape both from his hat that he—he wears, you know, a distinctive style of hunting hat, and I know him.

Q. So it wasn't any question when you reviewed the tape that that was—he was the person—

A. That's correct.

THE COURT: Before you go on—

MS. STERLING: Yes, sir.

THE COURT:—Mr. Vankesteren, do you contend that the individual on the videotape is not you?

MR. VANKESTEREN: No, sir.

THE COURT: All right. I'll watch it. Thank you. Go ahead. Let's play it.

(Videotape playing)

[60] MR. VANKESTEREN: Is it possible for me to interject something there?

THE COURT: Stop the tape.

(Videotape stopped.)

THE COURT: Yes, sir. Go ahead.

MR. VANKESTEREN: I would—like everybody, when they see this tape, the only reason those hedgerows is there is because of me. When my family first took over that farm—

THE COURT: Let me just explain to you. This is testimony. You can offer it if you choose to testify. You can't testify like this. You haven't been sworn as a witness, and you do have to remember that you have the absolute right not to testify. And I'm not going to force you to testify, but to the degree that you want to testify, you can't do it in this fashion because you're making statements that are not subject to cross-examination.

You see how this works? You have to be in the witness stand to make affirmative statements. So some of your objections have been based on what you want to say to the Court as testimony. I can't take it as an objection. You have to say it when you testify under oath because what you give up when you agree to testify is your Fifth Amendment right against self-incrimination, and you also accede to the obligation to submit to cross-examination. I want to make [61] sure you understand that, Because as far as I'm concerned, you haven't made any statements in this court yet that the Court can take as evidence.

MR. VANKESTEREN: Okay.

THE COURT: You've remained silent.

MR. VANKESTEREN: Yes, sir.

THE COURT: At the appropriate point I'm going to ask you if you want to make statements or remain silent, And you can exercise your Fifth Amendment right or waive it at that time. Clear?

MR. VANKESTEREN: Yes, sir.

THE COURT: All right. Sit down. Let's go with the tape.

(Videotape playing.)

THE COURT: Are you suggesting that the tape at this point no longer has any—

MS. STERLING: No longer has any relevance. We are talking about activities that are on the—I think on the 20th and we are up to January 22nd.

THE COURT: All right. Then I'll direct the tape to be stopped at this time.

(Videotape stopped.)

THE COURT: All right, Ms. Sterling. You have your witness on the stand here, and I've seen the tape. Go ahead.

BY MS. STERLING:

[62] Q. Mr. Garvis, based on your expertise both as a trapper and as an identifier of migratory game birds, can you tell us what you were able to discern after reviewing that tape?

A. On the 17th of January, which is the first instance where a bird was killed, I could not, with certainty, identify it as a Red-tailed. I narrowed it down as one of the larger birds of prey based kind of on its wing shape, coloration, the fact that it was attracted

to the trap, and it could have been a Red-Tailed or a Broadwing or a Red-shouldered. It was too small to be an Eagle and it was too large to be a Cooper or a Sharp-shinned. So it had to be one of the three that frequent that area. However, on the 20th—

THE COURT: Well, wait a minute. What do you mean one of the three that frequent that area? Which three frequent that area?

THE WITNESS: Oh, I'm sorry. It would be one of the three would have been of the Red-tailed Hawk, Red-shouldered Hawk or a Broadwing Hawk, all have similar size and frequent the same type of habitat that would be attracted to that live visual bait.

THE COURT: Okay.

THE WITNESS: I felt confident it was a protected species.

BY MS. STERLING:

Q. And all of those types of hawks are migratory game birds;[63] is that correct?

A. And they are covered—

Q. You're referring to the tape or video surveillance on the 17th. The—there was only one person visible in that—

A. That's correct.

Q.—scene, and who would that be?

A. Mr. Vankesteren.

Q. Okay. And that Mr. Vankesteren is the defendant here today?

A. That's correct.

Q. If the witness could indicate he's identified the defendant, Your Honor.

THE COURT: Identification is noted.

BY MS. STERLING:

Q. And then again there was another—there was some more activity on the 20th of January, if you could tell us what you could discern from your expertise insofar as what was going on in that portion of the tape.

A. On the 20th of January after Mr. Vankesteren dispatched the bird with the ax, as he exited the scene, he held it by the—in such a manner that the breast portion was visible to the camera, and I saw that belly band on the bird, and it was no doubt in my mind that was a Red-tailed Hawk, based on its field marking, which is characteristic of that species.

Q. All right. And when you say dispatched with an ax, he [64] was killing it?

A. Yes, killing.

Q. As was the case in the video—

A. 17th.

Q.—the preying on the 17th? All right.

A. I had no doubt in my mind that that was a Red-tailed Hawk that point on the 20th.

Q. All right. And no doubt in your mind also that it was Mr. Vankesteren who—

A. That's correct.

Q.—activity that you taped? Did you ever have an occasion to meet with Mr. Vankesteren and discuss this case or the activity that occurred?

A. We did. Myself and Agent Rolince on the 30th, the day we viewed and pulled the evidence, the trap from the property, set up an interview with Mr. Vankesteren at his residence. Agent Shires and Agnese were also there, but they never exited their vehicle or had any contact with Mr. Vankesteren.

During that conversation, during that interview, Mr. Vankesteren told me he'd been trapping since he

was eight years old. I asked him about—I came to talk to him about his hawk trap. He said that it was very clear that it was a fox trap and that it catches mostly fox, and that he had caught 10 fox at that location this year alone.

Q. And you're referring to the trap that is the subject [65] of—

A. The trap that we just viewed as the location in question:—Mr. Vankesteren stated he catches hawks inadvertently. When asked how many he has caught, he was very vague. He said only a few. I don't catch that many. He did state that he had released one this year and that he had killed one this year. And I took that to mean in addition to what we viewed on the tape.

Throughout the interview, which really struck me as—Mr. Vankesteren was not in any way remorseful that he inadvertently caught this species. He referred several times, I wish you would drop this. I don't feel guilty of anything. He said we should direct our attention to the local—the land developers, that they are doing more to destroy habitat and hurt wildlife than he is. He made a statement that he's the only one that is doing any habitat or maintaining wildlife habitat in the area, and that it attracts predators to his property because it keeps wildlife on his property.

I asked him if he was familiar with the bird species around. He said he can identify all the birds around here, and he indicated, you know— we were standing in, his front yard at the time of the interview. So I took it to mean, you know, the surrounding area.

Myself and Agent Rolince directed him to specifically what he did with the hawks that we viewed in the videotape. Mr. Vankesteren's first thing was that

he removed them from the trap and he buried them on the farm. I can't say caution but I reminded Mr Vankesteren that were trying to seek evidence in a case that, an illegal activity, and that he should be cautious as to what he says.

At that point he said that, um, he may have threw one or two in the hedgerow. And when I asked him as to how many it was, if it was one or two, he said he really couldn't remember, that he catches mostly fox. And one of the things that struck me most by this interview, that was conducted by both myself and Agent Rolince, was that one of his closing statements was he said, I wish you would drop this. I don't really want to be hassled by this. I just—of all the people I've interviewed in wildlife violations, this—just was not bothered by this at all.

Q. And Mr. Vankesteren knew you and knew you to be a game warden, and you informed him why you were there and so forth; is that correct?

A. That's correct.

Q. All right. Insofar as the trapping, because flocks of migratory game bird cannot get anything other than a federal permit to trap those; is that correct?

A. That's correct.

Q. Is there any requirement under Virginia law that you have [67] a permit to track in general or to track any specific type of mammal?

A. Yes. The tape wildlife in Virginia, you'd be required to purchase a regular hunting license in addition to trapping license. However, on his own property, a landowner is not required to have a license on his own property or a land that he leases and resides on, he wouldn't have needed one on the trapping location we viewed on the videotape.

And even though the license requirement would not be pertinent to a landowner, he's still subject to seasons, bag limit, closed species

Q. All right. One last thing I want to raise with you, Mr. Garvis. Subsequent to this time, you did, as part of your investigation, get your special unit people to give you an aerial map of the location; is that correct?

A. That's correct.

Q. And how did that come about?

A. I use a GPS to mark the trap location, and that would be fairly accurate. Sometimes it could be within 40 feet, sometimes it could be within a few feet but it was fairly accurate to the location. I gave those coordinates to Agent Agnese.

Q. You gave the coordinates to Agent Agnese and then he developed this aerial map for you?

A. Yeah. He took them to our GIS office in Richmond and [68] those qualified people—

Q. All right. I'm going to show you -

A.—made the map.

Q.—what has been marked as Government's Exhibit Number 6-A and 6-B, and I'm going to ask you to identify this exhibit.

THE COURT: All right. Defendant has had an opportunity to review Government 6-A and 6-B; is that right?

MR. VANKESTEREN: Yes, sir.

THE COURT: Okay. Then they are with the witness now.

BY MS. STERLING:

Q. All right. Would you look at 6-A and tell the Court what that is.

A. It's an overview of the trapping location that would also involve several surrounding properties, one of which is Mr. Vankesteren's property, labels the road, the major state roads that are in the area, Poplar Cove, and the location where the—I accessed the farm and trapping location is off Acorn Road.

Q. Okay. And as far as where the location of that, the trap is, how is that marked on that map?

A. It is a red dot. It was indicated on this as a red dot, and it was where the field access enters the back field, it was down from that.

[69] Q. Is it a location that's visible from the road?

A. Probably the exact trap location is not because it is on the other side of the hedgerow. If you were to drive by from the state road, you wouldn't see the trap.

Q. Okay. I'm going to show you 6-B, as well. Let me just say, as far as Mr. Vankesteren's home, where is that located in relation to where the trap was found?

A. Well, it's on the—I guess it would be highlighted by the green driveway. It's across—I'm not even sure the name of the side creek that comes off of that. It's somewhat distance away.

Q. Is—does the map show a building that would indicate where his home is?

A. Yeah. It's—it shows his home and the curtilage and outbuilding surrounded by wind break.

THE COURT: How far away is it from the traps?

THE WITNESS: That would be hard to estimate because the crow flies—couple miles anyway but by road.

BY MS. STERLING:

Q. Is it fair to say that the trap isn't located anywhere near his home or the immediate area surrounding his home?

A. It would be somewhat of a lengthy walk to leave his yard and walk around the creek and the adjoining property and to access this. It is not something you can look out his upstairs window and monitor.

[70] Q. Let me ask you this. If you're familiar with Mr. Vankesteren's property, is the property where his home is located owned by him?

A. I believe it is, yeah.

Q. And then the property where the trap is located, that's additional property that he leases; is that correct?

A. That was my understanding.

Q. Okay. All right. If you look at Number 6-B and just tell us very briefly what that -

A. Yeah. The red dot would indicate the area. I would say on this photograph, the trap would be more along the edge of the hedgerow, but it's probably about as accurate as a blow-up as they can get.

Q. And that's just a blow-up of 6-B?

A. That's just a blow-up of 6-B indicating the field access road that Mr. Vankesteren would drive on, and the hedgerow where the trap was located, and the hedgerow where I found the immature Red-tailed Hawks.

MS. STERLING: Your Honor, the Government would move to admit what's been marked as Government's Exhibit 6-A and 6-B.

THE COURT: Defendant have any objection?

MR. VANKESTEREN: The marks on there where they showed the traps are not correct.

THE COURT: You can testify to that, sir, but the [71] question here is do you have an objection to these

photographs as representative of what the defendant contests—the plaintiff—I'm sorry, the officer contends is the site of the traps with a error of plus or minus 40 feet?

MR. VANKESTEREN: Yes, sir, I'd go along with that.

THE COURT: All right. That is the testimony before me, that there could be that degree of error. Ms. Sterling, is A a blowup of B or is B a blowup of A?

MS. STERLING: B is a blowup of A. A is the overview map that shows you the access road. I believe you can see buildings there that would indicate the home of Mr. Vankesteren, and the hedgerow that everybody's been talking about, The little red dot indicating the location or approximate location of the trap in question.

THE COURT: Which of these two buildings with the—or sets of buildings with the green driveway leading to them is Mr. Vankesteren's home?

THE WITNESS: The one farthest away.

THE COURT: The one to the far left?

THE WITNESS: Correct.

THE COURT: I have it. Thank you.

MS. STERLING: I have nothing further of this witness, Your Honor.

THE COURT: All right. Do you have another witness [72] to call?

MS. STERLING: Two more, Your Honor.

THE COURT: All right. Mr. Vankesteren, you have the right to cross-examine this witness. If you want to do so, come up to the podium. Mr. Vankesteren,

remember that you are only asking him questions within the limits of cross-examination regarding his testimony. You are not testifying here—

MR. VANKESTEREN: Okay.

THE COURT:—at this point in the trial.

MR. VANKESTEREN: Yes, sir.

THE COURT: All right. Go ahead.

CROSS-EXAMINATION

BY MR. VANKESTEREN:

Q. The day you first came to the trap, who was the other warden that was with you?

A. That was Officer Steve Sturgis. He is no longer employed with the department.

Q. Okay. Did Mr. Sturgis say to you that he had seen my traps before?

A. No, Not that day.

Q. He has, you know.

THE COURT: Let me be clear about this. You don't say he has because that's testimony. Ask him questions.

MR. VANKESTEREN: All right.

[73] THE COURT: I'm becoming concerned that you fail to appreciate what I have been saying to you repeatedly about the difference between your testimony and your right to cross-examine here, sir, and you are unduly prolonging these proceedings, and I'm going to sanction you if you don't stop.

MR. VANKESTEREN: Yes, sir.

THE COURT: I've done everything I can to explain to you the difference.

MR. VANKESTEREN: Okay.

THE COURT: I hope you understand. You do not testify at this point.

MR. VANKESTEREN: I got you.

THE COURT: You may ask him questions. Ask him questions.

MR. VANKESTEREN: Yes, sir.

THE COURT: Go ahead.

BY MR. VANKESTEREN:

Q. Did you talk to Officer Bennett about my traps?
A. Not that day.
Q. Was there anything—when you first found the trap, was there anything illegal about it?
A. I did not see any trap tags on it, but, no, I didn't see anything illegal about the trap.
Q. Nothing illegal at all?
A. Not that I could pick out.
[74] Q. When you first saw the trap and you realized nothing was illegal about it, did you have any idea at all of, like, just calling and saying, Steve, your trap, it looks suspicious. I've got a lot of training. I need to get you straight on this sort of thing? Did that ever occur to you?
A. My concern when it was a trap that I really felt would catch birds of prey, and I wanted to see what the intentions of the trapper was. I thought that was you, and I wanted to see what your intentions were. Were you actively catching hawks.

MR. VANKESTEREN: Okay. Let's see. I guess that pretty well covers everything, then.

THE COURT: All right, sir. Anything else?

MR. VANKESTEREN: No. I think that will take care of it.

THE COURT: Thank you.

MR. VANKESTEREN: You're welcome.

THE COURT: Ms. Sterling.

MS. STERLING; The Government has no further questions of Mr. Garvis. We would call Agent Agnese.

THE COURT: You have moved the admission of all of these Exhibits 1-A through 6 -

MS. STERLING: I'm sorry.

THE COURT: 1-A through 6, Government's 1 through 6. I think I've asked the defendant on each occasion whether he [75] had any objections. I've heard what he had to say. I have admitted them all. I'll say that at this time. You may stand down, sir. Thank you.

THE WITNESS: Thank you, Your Honor.

(The Aerial maps were received in evidence and marked as Government's Exhibit No. 6A-B.)

MS. STERLING: I was going to ask Mr. Agnese, just because he conducted the video, to provide the foundation. He's viewed it, just for purposes—

THE COURT: Before we do that, you are standing up, sir. What is it you want to say?

MR. VANKESTEREN: I'm sorry. I had one more piece of evidence I want to ask him about. Is it too late?

THE COURT: No, it's not too late. Go back on the stand. I'll give you a chance to reopen.

MR. VANKESTEREN: I'm sorry. I guess—I've never done this sort of thing before. I'm a little bit nervous.

THE COURT: I don't want you to be nervous. I just want you to follow the rules, okay.

MR. VANKESTEREN: All right.

THE COURT: All right. Go ahead and ask questions. We are reopening cross-examination of Agent Garvis.

BY MR. VANKESTEREN:

Q. Okay. You do say that it is possible, and you see it quite often, that people do catch other animals besides what [76] their target animals are?

A. Yeah. It's possible. And I have dealt with that in the past.

Q. Okay. Are you familiar with the—published by an interview of government trappers about the animals that they intentionally catch or unintentionally catch that is published every year?

A. I'm not familiar with that. I'm not—I know that there is a study put out or a publication put out but I'm not familiar with it.

Q. Do you realize that in the United States last year they caught 194 Red-tailed Hawks?

MS. STERLING: Objection to the relevance, Your Honor.

THE COURT: I'm going to allow him some latitude on cross-examination. Your objection is overruled subject to the Court's intervention if this goes too far afield. Ask the question again.

BY MR. VANKESTEREN:

Q. Do you realize that in the United States last year they caught—these are government trappers who were trained just like you, professional trappers, they killed 194 Red-Tailed Hawks last year, this is according to their own records?

A. I would have no reason to doubt that, Government trappers catching and targeting birds of prey.
[77] Q. I mean some—it says intentional/ unintentional, target/nontarget. They have—in Virginia, they caught a Red-Tail—I mean, a Great Blue Heron—I'd like to put all this as evidence.

THE COURT: He hasn't given you any basis for introducing it yet, sir. What is it?

MR. VANKESTEREN: What it shows that—

THE COURT: What is the document specifically?

MR. VANKESTEREN: The documents?

THE COURT: What are they? Where did you get them?

MR. VANKESTEREN: They are from the Government themselves they put out every year showing intentional and nonintentional animals that they catch by Government trappers.

THE COURT: If you want to introduce them, you'd have to introduce them at the appropriate time. If you want them to be introduced through this witness, he would have to testify in such a way as the Court would find them relevant and material. How do you want to proceed?

MR. VANKESTEREN: The main proceeding is that it is possible, and you admit that, that you can catch unintentional pray, including Red-tailed Hawks, Great Blue Herons, dogs, I mean every kind of animal on earth in the United States is here and they caught—some caught intentionally and some unintentionally. So it would be—it [78] would probably be—would you say its a fair assessment that somebody putting out a trap has a very likely is going to catch something unintentionally?

THE WITNESS: No, I would say not very likely. Also, you have to differentiate an intended catch and unintended catch. It is kind of a funny definition, especially by when you're dealing with USDA. If I am setting for a fox and I catch a raccoon, it is deemed an unintentional catch but not an undesirable catch.

At the same time you can say I've set for a fox and I've caught a Bald Eagle. That is an unintentional catch, and that is something you really don't want to catch also. So there's a little bit of manipulation, or, if you would, some definition between an unintentional and intentional. The agents could have been trapping for Great Horned Owls and/or Red-tailed Hawk, which would deem it in the unintentional or nontarget catch.

BY MR. VANKESTEREN:

Q. But you say that wouldn't be bad if they did that?

A. Well, if the agent—if the agent is assigned, and I—if the agent is assigned to a specific assignment to catch this specific animal, then I guess that would be a fine thing. But the average person out trapping predators or furbearers to be catching protected species is a problem, and it can be avoided.

[79] A. But you do admit that, I mean—it happens, so, I mean—

A. It happens. Based on the trapping ethical and trapping practices of the individual trapper, it happens, and it happens on a fairly infrequent basis for somebody that is definitely trying not to catch protected species.

MR. VANKESTEREN: Okay. That is all. Thank you.

THE COURT: All right. You can stand down, sir. Thank you.

Did you have redirect?

MS. STERLING: No, Your Honor.

THE COURT: All right. Thank you.

(Witness excused.)

MS. STERLING: Government would call Agent Agnese.

THE COURT: Agent Agnese, come on up.

(Witness was sworn.)

THE COURT: All right, Agent Agnese. Come on up and take the stand. Witness is with the Government.

MS. STERLING: Thank you.

GENE AGNESE, called by the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. STERLING:

Q. Sir, if you would, please, state your name for the Court.

A. Yes, ma'am. Special agent Gene Agnese.

[80] Q. Okay. And how are you employed?

A. I'm the special agent with the Department of Game and Inland Fisheries.

Q. And how long have you been in that capacity, working in that capacity?

A. I've been an employee of the Department of Game and Inland Fisheries as a law enforcement officer for 19 years. I've been a special agent now for four years.

Q. And what do your responsibilities as a special agent entail?

A. Law enforcement efforts dealing with hunting, fishing and boating across the whole Commonwealth.

Q. All right. In connection with your employment did you become involved in an investigation of the possible or illegal trapping of hawks in Accomack County, Virginia, in January of this year?

A. Yes, I did.

Q. And how is it that you became involved in that investigation?

A. Sergeant Garvis contacted me somewhere around January 7th in regard to a trap that was set in Accomack County here in Virginia, that he was suspecting the person was trapping migratory birds with, and he asked our assistance in setting up some type of surveillance that we would conduct ourselves in person or utilizing the surveillance cameras that we set [81] up frequently.

Q. Okay. And so what did you do, based upon Mr. Garvis' request?

A. We arrived at the property in Accomack County on January 11th, took photos of the trap and. to lay cold traps in the cage trap and determined at that time that our best course of action would be setting up a surveillance camera there on the property to try to find out who was utilizing this trap and what they were exactly trying to catch and catching.

Q. Okay. And why did you decide that the surveillance camera was the best method to use?

A. There are five special agents here in the Commonwealth. We are spread out throughout the state, so there was not any possibility that we could sit there and watch this piece of property for any extended period of time. And since it was an open field, no reasonable expectation of privacy, we felt comfortable with open field doctrine, that we could set sur-

veillance camera up, since we had criminal activity ongoing there at the scene.

Q. And you said that this, you've done before, this is kind of a regular procedure for you?

A. I'd say, yes, ma'am, I've set up probably 24 surveillance cameras over my four years here with the department as a special agent.

Q. Okay. And are you trained and experienced in setting up [82] the equipment?

A. I am, myself and Special Agent Shires, Special agent Holler are the three that primarily go around and set up surveillance cameras where they are appropriately to be used.

Q. Okay. And on this occasion when you went out to this property off Acorn Road in Accomack County, tell us briefly how you set up the equipment and what the procedure was to gather evidence.

A. Sure. As you could see on the videotape, we had the trap, the cage trap and leghold traps located four to five feet away from the hedgerow facing towards the field. What we decided to do at that point was to set up the surveillance camera directly behind the cage in the leghold traps to try to catch and identify the person that was coming in and tending to that trap and what game they were catching.

So the surveillance camera itself, the camera lens was set up behind the trap looking at the trap and then the field beyond it.

Q. All right. And the scope of that camera was not very wide; is that correct?

A. That's correct. I would say the scope is probably 12 feet by 12 feet. We narrow the—what we are trying to catch on videotape.

Q. Right.

A. We want to specifically be able to find the person that's [83] committing the crimes and not things that are not necessary to our investigation at all.

Q. Okay. So on the 11th of January as you set up the video equipment; is that correct?

A. Yes, ma'am.

Q. And were you able to determine whether it was working properly?

A. Before we set up the camera, we are constantly testing the camera to make sure that the sensors are working. We program the date and the time of the camera and double-check that when we set it up and before we leave the location to make sure everything is working accurately and that everything is functioning properly. We put new batteries into the components that require batteries and—

Q. Okay. And on this occasion the camera that you used, it didn't take constant surveillance; is that correct?

A. That's correct. We set the camera up to run during daylight hours.

Q. All right.

A. And that's what this setup was. And we also set it up to run for a specific amount of time once the motion is detected which activates the camera.

Q. All right. So that's the camera begins to roll when there is some motion. It is motion activated; is that correct?

[84] A. Yes.

Q. So it is not running continuously, 24 hours a day; is that correct?

A. That's correct. I would compare it to maybe someone's security lights they have at their home.

Q. Okay.

A. The switch goes on but the lights are not turned on until there is motion, and they're activated that way, would be similar to that.

Q. And, again, this is pursuant to your standard procedure, this is the camera you would normally use for this type of surveillance; is that correct?

A. This is the Guardian 2000. This is the camera we use throughout the state, yes.

Q. All right. So on the 11th you put the camera out and it appeared—everything appeared in order and was working; is that correct?

A. Yes, everything was in order, yes.

Q. When's the next time you came out to the property?

A. I came back on the property January 24th just to make sure everything was still working well with the camera, to make sure batteries didn't need to be replaced. And at that point I was going to change the recording tape in there and put a new one in and observe what had already been caught on camera, if anything at all had been caught.

[85] Q. And did you do that?

A. I did.

Q. Did the equipment appear to be working properly?

A. Yes, ma'am. It was working fine.

Q. Okay. And did you review the tape that you retrieved on that date?

A. I did.

Q. And what did you do with it?

A. The tape was in my possession. It stayed in my possession throughout this entire investigation. I didn't review the tape there at the scene. When I went to the scene, I replaced the tape, made sure the batteries were working, and then left, and then our—

in the vehicle I have a tape player that I was able to watch the tape and see what was on it.

Q. Okay. In the tape that was reviewed in court today that was marked as Government's Exhibit Number 5, did that accurately reflect what you reviewed, the tape that you reviewed on the 24th of January as far as the surveillance that occurred on the property in question?

A. Yes, it was.

Q. Okay. And that was—would you—after you reviewed it did you—you turned it over to the federal agents; is that correct?

A. That's correct. After January 30th, after we had collected all the evidence and stuff like that, that information and tapes were turned over to Agent Rolince, yes, ma'am.

MS. STERLING: Okay. All right. At this point the Government would move to introduce Exhibit Number 5. I'm not sure if I did it before or not, Your Honor.

THE COURT: All right. Exhibit 5. Any objection to Exhibit 5?

MR. VANKESTEREN: No, sir.

THE COURT: All right. The objection—the—hearing no objection, the Government 5 is admitted into evidence.

MS. STERLING: Okay.

(The video was received in evidence and marked as Government's Exhibit No. 5.)

BY MS. STERLING:

Q. So when you went out there on the 24th of January to retrieve the tape, what, if anything, did you observe with regard to the trap?

A. I observed the trap. I observed that there was—appeared to be several dead pigeon carcasses inside the trap. And I also observed that one of the leghold traps was still set and operational at that point on the 24th. Some of the (1 other traps were turned upside down. Some of them had the blade swung on itself, but there was at that point one [87] leghold trap that was still operational and being used at that point.

Q. All right. Let me show you what's been marked as Government's Exhibit Number 7 and ask you please to identify that for me.

THE COURT: All right. Government Exhibit Number 7 has been shown to the defendant. All right. Government number 7 is now with the witness.

THE WITNESS: Thank you.

BY MS. STERLING:

Q. Could you just for the record identify that photograph?

A. Yes. The leghold trap that's located on the bottom right-hand edge of this paper is still set and operational.

MS. STERLING: All right. The Government would move to introduce what's been marked as Government Exhibit Number 7. And after this occasion—

THE COURT: Do I hear any objection—

MS. STERLING: Oh, I'm sorry.

THE COURT:—to Government Number 7?

MR. VANKESTEREN: I object because it is not true.

THE COURT: All right. He says he took this photograph on January 24th and that it accurately depicts the conditions on that date. What is the basis?

MR. VANKESTEREN: That is not true.

THE COURT: All right. Why is it not true?

[88] MR. VANKESTEREN: Because I sprang all those traps on that day, and I know because I'd been there and flip the traps over on the top—somebody had reset one of the traps.

THE COURT: All right. That is a matter of testimony. I'm going to admit that as evidence at this time. Go ahead.

(The photograph was received in evidence and marked as Government's Exhibit No. 7.)

BY MS. STERLING:

Q. All right. And I'd now like to show you two photographs that's been marked as Government's Exhibit Number 8. I'm sorry. I was asking a question. Before I show you that, after the 24th, what's the next time you returned to the property?

A. On January 30th.

Q. Okay. And at that time you said you retrieved another tape. Did you use another tape?

A. Yes, we did.

Q. Okay. And did you conclude your surveillance observation on that date?

A. We did. I took additional photos there at the scene but we concluded the investigation and the surveillance at that date, yes.

THE COURT: What was that date, sir?

THE WITNESS: January 30th

[89] THE COURT: January 30th. Thank you.

MR, VANKESTEREN: Yes, sir.

MS. STERLING: Now I'd like to show you Government Exhibit Number 8, if you would just identify that for me, please.

THE WITNESS: These were the mid-range photos I took of the trap and the hedgerow in the field on January 30th of '07.

MS. STERLING: All right. Government would move to admit those photos of the trap, Your Honor.

THE COURT: Any objection, sir?

MR. VANKESTEREN: No, Your Honor.

THE COURT: All right. Government Number 8 is admitted into evidence.

(The photograph was received in evidence and marked as Government's Exhibit No. 8.)

BY MS. STERLING:

Q. And following, Mr. Agnese, in preparation for court today you did have the aerial maps prepared of the location; is that correct?

A. Yes, ma'am.

Q. And they were previously marked as Government's Number 6. Did they accurately reflect what you viewed when you were out there in the scene?

A. I agree with Sergeant Garvis. There is a plus and minus [90] as far as the accuracy of exactly where the trap was, but that is a good representation of where the trap was located on the hedgerow of that piece of property.

MS. STERLING: Okay. Thank you very much.

BY THE COURT:

Q. Refresh my memory. What is the state of the evidence with regard to the date on which the con-

versation took place between Agent Garvis and the defendant?

A. That was also on January 30th, Your Honor.

THE COURT: Thank you. I just wanted to be reminded of that. I believe that is not contested testimony.

All right. no you have any questions of Agent Agnese, sir?

MR. VANKESTEREN: Yes, sir.

THE COURT: All right. Come to the podium and ask your questions.

MR. VANKESTEREN: Okay.

CROSS-EXAMINATION

BY MR. VANKESTEREN:

Q. Is the motion detector, how does that work on that trap? Is that infrared also?

A. No, sir, it is not. It acts on motion and temperature, but it is not infrared at all.

Q. Does it strike you strange that that trap sat there for 20 days, that is a remote location, you never saw one single [91] mammal, no deer, all you saw was the flock of wild turkeys, the two Hawks, and a bunch of little sparrows, and then one dog ran by and then people? No small mammals, no deer, even though that area is loaded with that sort of thing?

A. I didn't have it as 20 days, Mr. Vankesteren. We set the camera on January 11th, and we observed the activity with the bird of prey on January 17th. So that was six days, sir.

Q. But the camera goes to the—it goes to the 30th when you picked it up. That's the end of the video. They show the guys going in there picking up the video on the 30th. He's right in there, one of these

guys is right in there. I guess somebody is. I don't know.

A. I'm just commenting what we observed on the 17th of January and the 20th of January in regard to this case.

Q. I'm talking about the entire video. You have to take the whole video into context there. Does it strike you strange at all that there is no mammals of any kind in that remote area, nothing? Mr. Garvis stated that that should attract all kind of foxes, raccoons, possums, nothing ever came up there. Doesn't that strike you as being strange?

A. I'm still confused about your 20 days, sir, because the last time we found you on tape we saw here in the courtroom was January 20th and you're referring to January 30th. That's only ten days.

Q. Then we have to see the rest of the tape, then, because [92] the tape goes to the 30th. It goes from the 11th—either the 10th—no, they put it in on the 10th, I think, and it goes to the 30th. That's when they picked it up.

A. I put it on the 11th. On the 17th it was a bird—

Q. And there was—

THE COURT: Wait a minute. Hang on. Ask a question, let him answer.

MR. VANKESTEREN: Yes, sir.

THE COURT: All right.

THE WITNESS: I set the surveillance camera up on the 11th, Mr. Vankesteren. On January 17th, we saw a bird of prey; On January 20th, we saw a bid of prey; and on the January the 30th, we removed the surveillance equipment. So from the 11th to the 17th was six days, from the 17th through the 20th was the three additional days, and then the 20th through the

30th was only ten days. So I'm confused about the 20 days without any activity that you're referring to.

BY MR. VANKESTEREN:

Q. Of mammals. I said you have birds in there. I stated the birds that came through there. But no mammals for, whether it was 19 or 20 days, I don't know, But there are no mammals. You don't get any mammals on there at all?

A. The way we have the camera set up, sir, The camera set up in a way that we might not necessarily catch a mammal coming to that trap. The motion sensor is activated. If that [93] mammal enters a scene and exits a scene within the time the motion detector is activated, we are not going to catch a mammal there necessarily. It doesn't mean that they were not there.

Some of the footage that we had on the videotape that we were not able to see anything, those were probably activated by a mammal that we just didn't catch on tape because the angle of the camera itself pointing down that far to the ground, possibly.

Q. I don't know. You don't think a deer—a deer stands almost as tall as I do. A deer walking by there, you wouldn't pick that up, huh?

A. I don't think a deer would be attracted to a pigeon in a cage, sir.

Q. But did you see the soybeans planted right along the left, that I left right along the edge there? There were soybeans in the video, all along the edge of the trap.

A. Well, I saw turkeys on there, sir.

Q. They were eating the soybeans also. You don't think that deer are attracted to soybeans?

A. Sir, we were setting this camera up for what prey was coming to the live pigeons in the trap, sir.

Q. Well, that picture of the dog you got that hasn't come up yet, that dog was at least—was at least 30 feet from the trap. If a deer had walked 30 feet from the trap, you would [94] have picked them up, too, wouldn't you, 30 or 40 feet?

A. Depends if he broke the motion sensor, sir.

Q. The dog broke it. Why wouldn't the deer do it?

A. Sir, you're asking me a hypothetical question.

Q. I just—I mean, you don't see anything strange at all about that, there is no other mammals, nothing out there at all during that whole—that whole period of time?

A. No, sir. Our investigation regarding this was somebody was trapping hawks possibly illegally and that's what we found on our videotape.

Q. Okay. Wait a minute. One other question here. There is some studies that show that cameras do make animals shy away from, especially mammals.

MS. STERLING: Objection to testimony by the defendant.

MR. VANKESTEREN: I'm sorry. I was just going to ask him one more thing.

BY MR. VANKESTEREN:

Q. Has he ever read anything about animals being—mainly mammals, mainly foxes and coyotes are the study I have, Are you familiar with any of those studies of mammals being scared away by cameras? I mean, when you go in there and put a camera in there, disturb the area and having a camera sitting there that—they found a lot of animals have some sense to them, but mainly coyotes and foxes are scared away [95] by it. Have you ever read any of those studies?

A. I have not read any of the studies or participated in any studies, no, sir.

Q. All right. Well, I have some of the studies here if you want to see them. That is all I have to ask. Thank you.

THE COURT: All right. You can stand down, sir.

MS. STERLING: Judge, just one brief question.

REDIRECT EXAMINATION

BY MS. STERLING:

Q. In Government's Exhibit Number 7, there was a photograph that you took on the date that you—I'm sorry, the date was the 24th where you said that the trap was activated?

A. It was operational, yes, ma'am.

Q. Operational. I'm sorry. When you reviewed the videotape for that day on the 24th, what did you find insofar as the condition of the traps, if anything

A. I found Mr. Vankesteren reset the traps specifically the traps that were sprung that the birds of prey were crawling into.

Q. And that was after viewing his killing of the birds?

A. Yes, ma'am, it was.

MS. STERLING: All right. Thank you. That is all I have.

THE COURT: Any other questions?

MR. VANKESTEREN: Yeah, I have one to ask.

THE COURT: Go ahead.

RECROSS-EXAMINATION

BY MR. VANKESTEREN:

Q. How do you know I was setting those traps?

A. Excuse me, sir?

Q. How do you know I was setting those traps?

A. I could see your activity as you were bending over.

Q. No way on earth.

THE COURT: Stand. There you go again.

MR. VANKESTEREN: I'm sorry.

THE COURT: Now, I'm telling you. You asked him a question. He's going to answer it, and you're not going to interrupt him in the middle of his answer.

MR. VANKESTEREN: All right.

THE WITNESS: Sir, it appeared to me once the trap caught the Red-tailed Hawks, that—

BY MR. VANKESTEREN:

Q. Which they—

THE COURT: Let him finish.

THE WITNESS:—that the jaws were closed, and the way to reset the trap, appeared to me that you were placing your foot down on the trap, resetting the jaws and setting the spring wire. At one instance on the videotape, I actually saw, as you were setting the trap, the trap accidentally spring, and you raised your hand up pretty [97] quickly so not to get your fingers caught in it, and feathers rose up after you'd done that. And then you went back down again and reset it again. That's what it appeared to me on the videotape, sir.

BY MR. VANKESTEREN:

Q. Was this on the 20th or the 24th?

A. This was when I observed the videotape on the 24th, and the time I just referred to was January 17th when that had occurred. But I also observed you

on the 20th reset the trap that you had the Red-tailed Hawk that you'd caught in.

Q. You're getting me confused now. You say on the 24th I had caught a hawk and reset it?

A. No, sir. On the tape that I observed on January 24th. The hawks that you caught were on January 17th, which I saw you reset the trap; And January 20th where I also saw you reset the trap.

Q. Right. And you're saying on the 24th I also reset the trap?

A. No, sir. The videotape I observed on January 24th. The tape from the surveillance camera that I went to your property and removed from the camera on January 24th that showed your activity on January 17th and January 20th specifically dealing with the two Red-tailed Hawks, those are the two days I saw you what appeared to me you resetting the traps. [99] Q. I thought you just said you saw me reset it on the 24th after I caught a hawk?

THE COURT: All right, stop.

MR. VANKESTEREN: All right.

THE COURT: It is clear to me that this line of questioning is unduly prolonging these proceedings. I understand the testimony. He's saying that when he first looked at the tape on the 24th, he noted the entries on the tape for the 17th and the 20th. And on the 17th and the 20th, he saw you take actions with regard to setting the traps.

MR. VANKESTEREN: Right.

THE COURT: But the time that he observed the entries for the 17th and the 20th was on the 24th when he looked at the tape in his truck after he recovered the tape from the scene. I've got the testimony. Sit down unless you've got another question.

MR. VANKESTEREN: No. Thank you.

THE COURT: Anything else?

MS. STERLING: Nothing further of this witness.

THE COURT: You can stand down. Let's have your last witness.

(Witness excused.)

MS. STERLING: Government would call Mr. Rolince.

(Witness was sworn.)

[99] DANIEL J. ROLINCE, called by the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. STERLING:

Q. Please state your name for the Court, sir.

A. Daniel J. Rolince.

Q. And how are you employed?

A. I'm a special agent with the U.S. Fish & Wildlife Service.

Q. Okay. And how long have you been so employed?

A. I've been a special agent with the Federal Government for ten years. The last three of which have been with the Fish & Wildlife Service.

Q. Okay. And what do your responsibilities entail?

A. To enforce federal wildlife laws.

Q. Okay. In connection with your employment, did you become involved in an investigation of the possible trapping of hawks in Accomack County, Virginia, in January of this year?

A. Yes, I did.

Q. And how did you become involved in that investigation?

A. I was contacted by Sergeant Steve Garvis to assist him in investigation.

Q. Okay. And what did you do?

A. On January 30th I met Mr. Garvis along with Special Agent Agnese and Special Agent Steve Shires, and was briefed on the [100] location of the alleged trap and the activity viewed on surveillance camera, videotape. We went to that location, and I observed the trap. Special Agent Agnese and Shires took down the surveillance camera equipment, and I seized the trap.

Q. Okay. And that occurred on January 30th?

A. Yes, ma'am.

Q. And the video that was shown today which was marked as Government's Exhibit Number 5, did you—what's your connection with that? Did you have anything to do with the video or so?

A. I received custody of that original videotape from Special Agent Agnese, and I've also reviewed the tape prior to today.

Q. And is what was shown in court today an accurate reflection of what you received from officer—or Agent Agnese?

A. Yes, it is.

Q. Okay. And you said that you collected evidence at the scene; is that correct?

A. Yes, ma'am.

Q. I'm going to show you a number of photographs marked as Government's Exhibit Number 9-A through D.

THE COURT: All right. Those are with the defendant.

[101] BY MS. STERLING:

Q. I'm going to ask you if you would to briefly identify the photographs in question.

A. Photograph marked 9-A is a wire cage, and the evidence tag. 9-B are the leghold traps that were seized. 9-C are the two Red-tailed Hawk carcasses which I received from Sergeant Garvis also on that date. And 9-D are three bird feathers that were previously seized by Sergeant Garvis from that trap site.

MS. STERLING: All right. Government would move to admit what's been marked as Government's Number 9 and it's A through D.

THE COURT: Does the defendant have any objection to the admission of these documents?

MR. VANKESTEREN: No, sir.

THE COURT: All right. These documents are admitted into evidence. Go ahead.

(The photographs were received in evidence and marked as Government's Exhibit No. 9, A-D.)

BY MS. STERLING:

Q. You've identified the birds in question as Red-tailed Hawks. How were you able to identify them?

A. I visually identified them with my training and identification skills, as well as looking them up in an identification book, and I sent them to the National Fish and [102] Wildlife forensics lab in Ashland, Oregon for professional identification and examination for cause of death as well as the identification of the three black feathers.

Q. And no doubt in your mind it is a Red-tailed Hawk?

A. No doubt.

Q. Okay. And Red-tailed Hawks are migratory game birds within the Migratory Bird Treaty Act; is that correct?

A. They are migratory birds. They are not game birds.

Q. I'm sorry, migratory birds?

A. Yes, ma'am. And they are specifically listed under Title 50 of the Code of Federal Regulations by name as protected.

Q. As protected?

A. Under the Migratory Bird Treaty Act.

Q. Under the Migratory Bird Treaty Act, is there any occasion under which a person can take, meaning hunt or possess or kill, a Red-tailed Hawk?

A. In order to kill a Red-tailed Hawk or any migratory bird which is listed, you would need a permit from the U.S. Fish & Wildlife Service to do so.

Q. Okay. And did your investigation lead you to determine whether or not Mr. Vankesteren had such a permit?

A. I reviewed the U.S. Fish & Wildlife Service database of permits, and Mr. Vankesteren did not have a permit to take Red-tailed Hawks.

Q. Are persons frequently granted permits, and if so, under [103] what circumstances might someone get a permit to kill or trap a Red-tailed Hawk?

A. I know firsthand of no issuance of permits for Red-tailed Hawks or other birds of prey.

Q. Okay. And did you have an occasion in the course of your investigation to speak with Mr. Vankesteren about the investigation or what you had observed or uncovered in the course of your investigation?

A. Yes, I did. I spoke to him on the afternoon of January 31st—I'm sorry, 30th.

Q. January 30th. And what, if anything, did he tell you with regard to the activity?

A. He said that those, that trap was set for predators, primarily fox, and that he had caught several fox and, I believe, raccoons at that site. He also admitted to catching some birds of prey. He first said

that he had buried those on his home property but then later changed that and said that he had put them in the hedgerow near the trap.

Q. Was this in the statement that Mr. Vankesteren made in the presence of Mr. Garvis?

A. Yes, ma'am.

Q. Okay. You were together?

A. Yes, ma'am. He also mentioned that during the beginning of his trapping activities he would catch more mammals, and when birds of prey would be trapped, then he would stop [104] trapping.

Q. Okay. And Mr. Vankesteren, who you're referring to, do you see him in the court today?

A. Yes, ma'am. He is sitting here at the defendant's table.

MS. STERLING: The record could reflect the witness has identified the defendant, Your Honor.

BY MS. STERLING:

Q. And were you able to determine, the property in question, was that of Mr. Vankesteren, that he had some property interest in the place where the trap was located?

A. I did not do any firsthand investigation. I only know of information from Sergeant Garvis.

Q. But when you spoke with him you made reference to where the property was located?

A. Yes.

Q. And he seemed to acknowledge that that was—he understood where that was; is that correct?

A. Yes, ma'am.

Q. Okay. Did you have any other occasions to speak with Mr. Vankesteren with regard to this case?

A. I've spoken to him a few times on the telephone. He has called to ask about the case and different questions regarding the charges.

Q. Okay. What, if anything, has he said to you with reference to this investigation or the case?
[105] A. He had again reiterated that he was attempting to trap other mammals, and that the birds were, you know, an incidental by-catch.

Q. Okay. All right. And the tape in question, you did provide that to him before court today so that he could review the video surveillance; is that correct?

A. Yes, I did.

Q. And that, again, is the same as what's been presented in court today?

A. Yes, ma'am.

MS. STERLING: All right. Thank you. Actually, let me just one last question.

BY MS. STERLING:

Q. The location of this incident where the trap was located in Accomack County is in the Eastern District of Virginia; is that correct?

A. Yes, ma'am.

MS. STERLING: Thank you.

THE COURT: All right. Any questions of this witness?

MR. VANKESTEREN: Yes, sir.

THE COURT: Go ahead.

CROSS-EXAMINATION

BY MR. VANKESTEREN:

Q. Is there anything illegal about using live bait in [106] federal laws?

A. No, sir.

Q. So there was nothing illegal about the trap until I actually caught the hawks, then? Then it became an illegal trap; is that correct?

A. Yes, sir.

MR. VANKESTEREN: That's all.

THE COURT: Any redirect?

MS. STERLING: No, Your Honor.

THE COURT: You can stand down, sir.

(Witness excused.)

THE COURT: Is that the Government's case?

MS. STERLING: That would be the Government's case, Your Honor.

THE COURT: All right. At this point it is 2:37.

Let me just ask the defendant. Unless you have anything else you want to bring to the Court's attention?

MS. STERLING: No, Your Honor.

THE COURT: How do you want to proceed at this time, sir? Do you have any motions or any other matters you want to bring to the attention of the Court?

MR. VANKESTEREN: I would basically just like to make a statement to the Court.

THE COURT: All right. So you don't want to make any motions at this time; is that right?

[107] MR. VANKESTEREN: I don't really know exactly what you mean.

THE COURT: I'm just asking you what you want to do now. And if you don't have any comments to make with regard to the evidence that has been introduced at this point—

MR. VANKESTEREN: Oh, yes, sir.

THE COURT: What is that statement? Do you intend to testify under oath?

MR. VANKESTEREN: Yes, sir.

THE COURT: Is the testimony that you intend to render under oath in that statement?

MR. VANKESTEREN: Yes, sir.

THE COURT: All right. Do you understand that if you are sworn to tell the truth and take the witness stand and make statements, you are subject to cross-examination by the Government's attorney?

MR. VANKESTEREN: Yes, sir.

THE COURT: And you're prepared to waive your Fifth Amendment right against self-incrimination?

MR. VANKESTEREN: Yes, sir.

THE COURT: Okay. Before you take the witness stand, sir, I'd like to know if you have any comments you want to make with regard to the Government's case at this point?

MR. VANKESTEREN: Yes, sir. As far as evidence go I [108] would like to show the rest of the tape. They cut it off too early.

THE COURT: And what would the—what purpose would be served in showing the rest of the tape?

MR. VANKESTEREN: On the 24th—on the 20th when I did catch the hawk—I couldn't figure out why I was catching hawks all of a sudden. I'd been catching mammals there. All of a sudden I started catching hawks. So I went back on the 24th, and in fact I took a friend with me, and we looked it over. She also has a lot of knowledge about wildlife and everything. And the only thing we could arrive at is that the trap originally had sat in the hedgerow.

THE COURT: All right. Now, wait a minute. If you want to offer this as testimony, I'll hear it. I'm asking you whether you want to make any motions with regard to the Government's case?

MR. VANKESTEREN: Yes, sir. I'd want to continue to go on with the tape.

THE COURT: That is another matter. Do you have any motions with respect to the Government's case?

MR. VANKESTEREN: I guess not.

THE COURT: Okay. Then the government's rested. You're not going to make any motions. You want to go forward to testify; is that right?

MR. VANKESTEREN: Yes, sir.

[109] THE COURT: All right. I'll be happy to hear your testimony. I'm going to require you to sit in the witness chair and be sworn first.

MR. VANKESTEREN: Yes, sir.

THE COURT: Again, I want to remind you, You don't have to testify. If you testify, you're waiving your right against self-incrimination, and you will be subject to cross-examination, and what you say can be used against you. You clear on all that?

MR. VANKESTEREN: Yes, sir.

THE COURT: All right. Raise your right hand and be sworn, sir.

(Defendant was sworn.)

THE COURT: Take the stand, sir.

MR. VANKESTEREN: You want to hear from me here? THE COURT: Yeah. We'll hear from you from the witness stand.

STEVE VANKESTEREN, called by the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY THE COURT:

Q. All right, sir. Bearing in mind that you do not have to testify, and recognizing now that you have been administered the oath and have sworn to tell the truth, what do you have to say to the Court about this matter?

[110] A. First—

Q. You can talk normally, sir.

A. First, I'd like to have the rest of the tape played.

Q. I'm going to take that request under advisement. Let me hear the rest of your testimony.

A. Okay. Um, I would like to make a statement now to the Court. Would that be okay?

Q. I'm happy to hear any testimony you deem relevant.

A. Okay. My name is Steve Vankesteren. I've been a farmer all of my life on my family farm in Accomack County, Virginia. Although I am a professional farmer, I admit to being only a novice trapper. I reluctantly got into trapping in 2002 after a large increase in foxes, raccoons and possums, and the resulting increase instance of rabies and predation on livestock and game birds.

I have worked with both federal and state wildlife agents in the past, both to improve habitat on my property and to obtain the necessary permits to control animals like deer and geese that were damaging my crops.

Therefore, I contacted these agencies first. They advised me that a case of mammalian predators, I

was on my own. Although they admitted that in the western states there is extensive help available, These services are not provided in the east.

I then set about buying the traps and equipment [111] necessary to begin trapping on my property. After the first year two things became apparent: First, the foxes were becoming wise to the traps. They would flip the traps over so I couldn't catch them or any other target animals.

After much trial and error in the second year, found that using live bait, which is perfectly legal, made them much easier to catch.

The second thing I realized is that I needed to extend the trapping season to make any major reductions in targeted species. The state did offer this permit as long as I agreed to certain rules, included being supervised by the local game warden, George Bennett. This T agreed to, and 1 obtained the permit.

I have these permits and sort of things here if you want to see any of them.

Q. I'll have them introduced into evidence at the appropriate time. Go ahead.

A. Okay. This case came about because of my use of live bait resulting in the catching of two Red-tailed Hawks. They most definitely were not the object of my trapping endeavors. In fact, I considered Red-tailed Hawks to be highly beneficial on my property since they help control pests like lobes and snakes.

With the increase in habitat, I have protected and created, plus trapping of the foxes, which has meant more [112] prey for the hawks, Red-tailed Hawks are actually at an all-time high on my property. They are increasing every year and producing over a dozen young annually.

Individual birds that do become a problem by killing poultry may be legally dealt with by obtaining the proper permits. Shooting them with a long range rifle is much easier and more efficient than trying to trap them.

I am sorry for all the trouble this episode has created. I realized it would have looked better if I had turned the two hawks loose, But I determined they would not survive, and it seemed more humane to kill them quickly than to subject them to a lingering death.

After capturing the two hawks, I disabled the traps and discontinued trapping. I hope that the Court can see all of this as a result of an honest mistake and come to the proper verdict.

THE COURT: All right, sir. Anything else you want to testify to?

THE WITNESS: This all got started—my neighbor called on around Christmastime. They actually live in Richmond, And they only come home for holidays. And they called and were disturbed about—they said there was some kind of bird in my trap. They know it is my property because I used to let them walk on there.

And I said, well, what kind of bird, and they didn't [113] even know. So I went right over there, and it was the pigeon that I used for bait was in the trap. So I called back and told them that I use the pigeon as bait to catch foxes. And I said if—and they were afraid—they actually were afraid that the dog was going to get trapped that was walking with them.

So they—I said, if you ever want to go walking back there again, I'll turn the pigeon loose and spring

the trap so you can let him walk in there. Well, I guess a couple days later I was over in the other field, and I saw the game warden vehicle pull up to the trap. Well, for the past years before that, I had been monitored by George Bennett under this trapping permit I've got, And also Steven Sturgis and the dog warden have all helped me get dogs out of the traps that I was using the same kind of trap for. They have all seen it and never made any comment that there was anything wrong with it.

I actually had them help me do this sort of thing because the dog warden would then take the dog away. And they had aerial photos of all this property. They had locations of traps. It was all on record up in the game department in Richmond, Virginia, I sent them, plus I had to send them $50 for the permit. And that enabled me to trap predators out of season, actually extend the season.

Now, when this trapping was going on, the season was [114] in so I didn't need a permit at that time. It was actually the legal season. But I was way up in the other field, and I saw the game warden pull up, and I figured it was George Bennett because periodically—he was the Accomack County game warden, and he was my liaison that the game department had given me to work with.

Well, I was way over in the field, and I said, that didn't look like George Bennett. But by the time—I been—I thought they were coming because the people had called about the pigeon in the trap. There was no hawks that had been caught at that time. I wasn't doing anything wrong.

So that night I called—well, I know Steve Garvis from before, and I finally realized by the shape of his

body that it was Steve Garvis, it wasn't George Bennett, and I could see the other game warden, and I know Steve Sturgis. knew it was two tall guys, and George Bennett is short.

BY THE COURT:

Q. What was the date of this incident, sir?

A. That was—I remember it was around Christmastime. It was right before they called him. It was around 27—what, Christmas is on—it must have been 27th through—I know at that time because they were home for the holiday. So that night I called—well, I recognized that it was him.

I called Steve Garvis on his phone, and I had—I didn't—his phone wasn't listed. I looked up his number. [115] There was no home phone listed, no cell phone listed. So I called a friend of mine who was another trapper that gave the meetings, and I knew he would probably have his home phone. I called his home phone number, and I left a message. I said, this wasn't anything to do with the hawks at the time because I hadn't caught any hawks. I wasn't even thinking about that.

I said, Steve, we need—I want to explain to you what's going on back there, and can you give me a call back. And he—I waited, and he never called me back. And the next time I saw him was when he came and told me they were going to prosecute me for catching the two hawks. Well, anyhow, then I did catch—I caught a hawk and—I finally figured out what happened on the second day with my friend. And she kind of pointed out. What has happened is that the trap originally sat back in the hedgerow where hawks couldn't see it. It was just open to the front but it was covered over by brush. But I had—I

first set that trap for two weeks and didn't catch—with just bait, which was a dead pigeon. I didn't catch anything.

When I put the live pigeon in there, within—it was one week, I caught five foxes, one right after the other. Well, a couple of foxes were large, big males, and what they do is they tore all the brush and everything around the trap. This was in early December. They tore the brush and [116] everything around the trap so it made it more out in the open.

So by the time January came or the end of December came around, it was the more open trap, and that's probably why the hawks could see it better and ended up going into it. After I caught the—after we figured this out, I immediately sprang all the traps. This was on the 24th. The pigeon by that time was—had died. I think the hawk must have hooked it with its claw or something because the pigeon was dead.

I sprang all the traps except for the one on top that was on the ground, and I flipped—what they call, I flipped the handle over, or whatever you call it, the jaw. I flipped the jaw over so it couldn't catch any. That one's got a real spring hair to it, and I had to kind of watch my fingers around it. I didn't want to reset it.

So I sprang all the traps except for the one I put—that was lying on the ground I put on top of the trap with the jaws over it. And the reason I want to reiterate that because the picture they show—and I sprang every trap on the ground. I know there was no question at all in my mind, the picture they show on the 24th is the trap sitting on top just like I described but flipped over, and a trap set on the ground, and there is absolutely no way in earth that happened. I

sprang the traps. Somebody else had to set that [117] trap.

Now, in the video they showed somebody coming in on the 24th, not me, and doing something on the ground on that trap. It looks like me—I can't figure out who it is. I thought it might be Steve Garvis, but I don't know if it is him. I don't know who it is. And resetting or doing something to the trap. And I figured out now that he must have reset the trap for some reason. It wasn't me.

So I tried to—when I realized I was catching hawks, I—I didn't want to catch Red-tailed Hawks. When I tried to—so I sprang the traps, and I didn't come back why I never came back after the 24th. I never revisited the area because the traps were sprung. There was no need to go back there anymore. And I wasn't going to set it anymore the rest of the winter because I was concerned about catching hawks. I didn't want to catch any hawks.

Q. Anything else, sir?

A. Um, here's all the permits and everything.

Q. Well, unless it is a contested point, the Court will consider as proven facts that you did secure one or more permits from the Virginia Department of Game and Inland Fisheries.

A. Yes, sir.

Q. At the proper—what is the name of your department?

The Virginia Department of Game and Inland Fisheries to allow [118] you to trap mammals, predators on your property. I'll accept that as a proven fact. It doesn't seem to be at issue with Ms. Sterling.

MS. STERLING: I'm not sure that they were current at the time of this current testimony.

THE WITNESS: It didn't have to be because it wasn't in the season. I mean, it was regular trapping season.

MS. STERLING: I don't think that would be relevant anyway.

THE COURT: If you want me to review these permits, I will.

MS. STERLING: I think that they are not current permits, But I haven't seen them.

THE COURT: All right. Let's have them. That is fine. I'm happy to—

THE WITNESS: This is everything you have to do to get them.

THE COURT: No. I want the permits. Are the permits in the pack?

THE WITNESS: Yes, sir. And also everything you do to get them.

THE COURT: All right. Let me just take the permits. I have two permits here. One is effective March 1st of 2003 through June 30th of 2003. The other is a permit effective March 1st of 2004 through March 30th of—through [119] June 30th of 2004.

Each permit issued to the defendant, each permit says special permit to authorize animal, animal control population. These are the actual permits. I'm going to allow the defendant to recover them. I have the information in question. I note that the authorized species do not include birds, and I will hand them to Ms. Sterling now to have her look at them.

MS. STERLING: I believe the agent has copies of these also, but they are not for the current—again, my objection is that they don't pertain to the time in

question. They don't pertain to the time of the offense.

THE COURT: May I see those again? Well, this permit has to be renewed each year December 1st. To the extent that the defendant obtained these permits, he did not obtain one for the relevant period. I think I would have to conclude that, would I not, Mr. Vankesteren?

THE WITNESS: Yes. I didn't need one for that period.

THE COURT: And the only issue before the Court is whether or not, to the extent any of this is relevant, and I have to say, giving Mr. Vankesteren some considerable latitude here, I'd have to have evidence as to whether or not a permit is required outside the period for which the permit was actually issued or whether or not the law is that you can [120] only trap during the permitted period. I don't know the answer to that question. I'm not sure it is relevant. Do you want to address that?

MS. STERLING: I don't think it's relevant, Your Honor. I mean, we are here about the trapping of the migratory bird.

THE COURT: All right, sir. Go ahead.

CROSS-EXAMINATION

BY MS. STERLING:

Q. Mr. Vankesteren, you said you're familiar with the Red-tailed Hawk, right, you knew what it was?

A. Yes, sir—yes, ma'am.

Q. And so when you found it in the trap, you knew you shouldn't be trapping them; is that correct?

A. Yes, ma'am.

Q. Okay. Now, you said you'd been working with the game wardens on your traps?

A. Yes, ma'am.

Q. Why didn't you call one of them?

A. In hindsight I should have, I guess. I didn't—I hadn't caught any, and I didn't think I was going to catch any more, and it appeared to me it was going to die anyhow so I just killed it.

Q. And how did you make that determination that it was going to die?

[121] A. Well, I've raised poultry since I was eight years old, and I've also hunted, so I've been around birds all my life, and I know that generally they don't live. They are not like mammals. They usually don't live very long once they are damaged. Mammals, if you catch one, they have four legs. If you catch one of them, they still got three legs to go on. A hawk has got two legs. If you catch one of them, he may live for a while but he is not going to be able to catch prey anymore. He is eventually going to die because he catches everything with his feet, a Red-tailed Hawk does.

Q Okay. But you're not really qualified to determine the extent of the injury to a bird that you've trapped; isn't that correct?

A I'm probably as qualified as anybody. I've seen all kinds of game and birds all my life.

Q Well, you don't have any veterinarian experience or medical training that would enable you to make that determination, do you?

A. I'm going to have to give you that point. I'm not a professional bird worker, whatever that means.

Q. And you know that you can't under any circumstances trap Red-tailed Hawks? Don't you know that, Mr. Vankesteren?

A. Under—if you have the proper permit to trap hawks, you could.

Q. If you had a federal permit, correct?

[122] A. Yes, ma'am.

Q. And you didn't have one, did you?

A. No. I've got one now, though.

Q. And you didn't have one at the time and you knew you couldn't trap them without having that permit; isn't that correct?

A. That's correct.

Q. Was there ever an occasion where you did catch something in your trap that was unintended, like a dog?

A. I caught my own dogs in my trap.

Q. And what did you do when that happened?

A. I think I stated that animals were four feet, is usually not a big problem. I let them go and they just—I might have taken one to the vet or something, but they did fine. It is different than a. bird.

Q. Okay. Did you ever have occasion to call a game warden because you trapped something in the trap that was accidentally, that you didn't intend to trap?

A. Somebody's dog that was—that was when I had Mr. Bennett and Steve Sturgis came, and then—they were actually back in my property checking—they check my traps all the time. This was—this was probably after the legal trapping season, But, I mean, but on permit. I did this in 2003 and 2004. And I saw them and I asked them if they would help me get the dog out of the trap. It had a collar and [123] everything so it belonged to somebody, and I didn't want to hurt it.

And they said, well, the best thing to do is call the dog warden. So that was David Small, and they called the dog warden, and between all of us we got the dog out. It was the same kind of trap, had the ex-

act same thing, except I think I had a clay on that trap, and we let it out, and that was the time that I did call them to help me. And they just looked at the trap and knew it was a clay on at that time and didn't make any comment about it at all.

Q. Okay. Now, you said you decided on the 24th of January to disable all your traps; is that correct?

A. Yes, ma'am.

Q. Well, after you caught the first hawk on the 11th of January and it was apparent that this trap was attracting a hawk, why didn't you disable it then?

A. That was a mistake. I admitted. I'm sorry. It was an honest mistake. I should have—when I caught one, I hadn't caught any, and I thought I wouldn't catch anymore. I thought I was going to keep catching foxes. When I caught the second one, then I disabled it. Then I figured it really was something wrong there, and that's when I brought my friend there.

Q. But you disabled the trap on the 24th, not on the 20th, which was the day that the hawk was—that you went out [124] there and killed that hawk, correct?

A. I couldn't quite figure out what did it. The pigeon—the hawk had hooked the pigeon so it wasn't even like bait anymore. It was just about dead. And it wasn't attracting—without a live bird in there, it wasn't going to attract anything at all. It might attract a fox, which I thought maybe that was a good thing, leave—the bird was just about dead so maybe I could catch another fox.

Q. But my point is you didn't disable the traps on the 20th of January, you disabled them on the 24th of January?

A. That's correct, yes, ma'am.

Q. Isn't it true that hawks prey on quail?

A. Not Red-tailed Hawks.

Q. They don't?

A. No. They mainly—their favorite prey of all is rabbits. And they will take rodents, you know, like rats. Once in awhile they will catch a snake. But rabbits are by far the favorite prey. Every once in awhile you will go—a quail is too fast for them to get. But every once in awhile you will get a low Red-tailed Hawk. That is how the nickname is hen hawk.

In the old days, when I first started, everybody said you should shoot every one of those you can because they kill chickens. And but—and it was legal in those days when I first started hunting.

[125] Then they changed the law, I think it was in '77, sometime around there that only farmers could kill them. Then they changed the law—I don't know when all the dates were—that no one could kill any of them without a permit. And I can't remember all the dates, But they do—you'll get a low road once in awhile that will come in and kill chickens.

Q. Okay. So your testimony is that your intention was not to catch hawks but to catch mammals?

A. Yes, ma'am.

Q. Okay. You heard Mr. Garvis give his testimony with regard to different types of traps. Why didn't you use a trap that was less likely to attract birds?

A. Well, I started out that way in 2002. I got some books, and they showed dirt hole traps, dirt hole sets for foxes and things like that. I did all that the first year. What happens is that I'm not like a regular trapper. A commercial trapper will trap a place—what happens is the foxes get smart to traps. You heard sly as a fox. Well, it's the truth. When the foxes get sly, a commercial trapper just packs up and

moves somewhere else. But I was on the same property. I want to thin out the predators on my property.

So when they started flipping the traps, a commercial trapper would have moved somewhere else, but I had to try to catch that fox that was getting smart because by [126] flipping traps, I wasn't catching anything, possums, raccoons or anything.

Q. Did you have other traps on your property?

A. Oh, yeah. I was trapping about 5,000 acres.

Q. And you're saying you couldn't use any other type of trap because the fox would figure it out and it wouldn't work?

A. Right. Well, what I would do is if I had—if I had a fox in the area that was wise to the traps, was flipping the traps—not all of them would do it—as long as I was catching them, I didn't do it. If I had to run up—you want—they say they've never seen anything before like it.

You want me to tell you how I came up with the idea on my own to use a live bird in the trap or not? Since you're asking about it.

Q. No. I'm asking why you didn't use the trap that wouldn't—

A. Well, because it wouldn't catch these smart foxes anymore. They learn how to get around them. However, imagine a fox walking all over the field and all of a sudden he sees a bird—he's real sly, and he's smart. He's not going to get caught. And all of a sudden he's walking around, and all of a sudden a bird flies up in front of him. He forgets about all this cunningness. The only thing he can think of is try to catch that bird before it gets away from him. So he runs up and jumps at the bird, and I've got him. And that's what I want.

So I'm trying—I mean, I'm trying to catch him, and I'm trying to outsmart him, and it took me awhile to figure out how to do it. I did it on my own.

Q. Okay. You indicated that you finally figured out on the 24th or a friend figured out for you what the problem was with your trap; is that correct?

A. Yes, ma'am.

Q. Who's your friend?

A. It is my girlfriend.

Q. Oh, okay. So it wasn't somebody who had any expertise in trapping?

A. Well, she's been at Virginia Tech and studied wildlife and stuff like that, And she had a pretty good idea. I mean, you know, I couldn't quite figure out why I was doing it.

She said—well, I just asked her to come over and take a look at it with me.

Q. And you heard Mr. Garvis testify that when he—when you were approached on the 30th with regard to what they had found on the surveillance video, that you didn't seem particularly concerned and thought that you shouldn't be pursued or charges shouldn't be filed.

A. I think—I don't know anybody who thinks—have you ever stopped somebody for speeding on the road? They all might be let loose. I don't know that anybody wants to be [128] prosecuted for anything. I never met anybody yet that wanted to be prosecuted, have you?

MS. STERLING: I have nothing further, Your Honor.

THE COURT: All right. Is this your evidence, sir? Is that all the evidence you want to present?

THE WITNESS: No, sir. I do have—I do have a permit now that allows me to take five Red-tailed Hawks in 2007.

THE COURT: Do you have it with you?

THE WITNESS: Yes, sir.

THE COURT: All right. Lets see it.

THE WITNESS: It is on my desk over here.

THE COURT: All right. Go down and get it. Hand it to the court security officer. You don't have to go back to the witness stand.

THE WITNESS: I also—I have other evidence to show that I was paid to donate the animals I got. The reason there is not a lot of animals outside because, you know, they were used for fur (indiscernible).

THE COURT: Let me see the permit.

All right. I'm going to ask the Court security officer to hand these two documents to Ms. Sterling.

Ms. Sterling, one appears to be a permit from the Fish & Wildlife Service, the Department of Interior out of Hadley, Massachusetts, authorizing this defendant to take [129] certain number of birds, including Red-tailed Hawks, using a shotgun or firearm, some other kind of firearm. And the other is a document that is a letter from some individual who is not—the Court's not clear, but it is dated July 7th, I believe. It is some sort of trapping association.

MS. STERLING: Your Honor, I guess my—

THE COURT: You want to ask the witness questions about these documents?

MS. STERLING: Well, let me just say that the documents itself, this letter is saying that he is do-

nating fox, raccoon, possum, has absolutely no relevance to this case at hand, and I object on that ground.

Actually, this permit is a permit for 2007 to kill, by shotgun or rifle, Red-tailed Hawk. Again, since it is a current permit and not within the period in question, I don't even see how that's relevant.

THE COURT: Let me just say this. With regard to both documents, it is the ruling of the Court that they are not admissible because they are not relevant. They do not deal with the period in question. Is it fair to say that no allegations supporting the charges in this case arose after the date, the effective date of the permit to take the wildlife?

MS. STERLING: That's correct. And the effective date would be July the 25th of 2007.

[130] THE COURT: All right. Those two documents will be returned to the defendant. They are not admissible.

All right. Anything else from the defendant?

THE WITNESS: Yes, sir. Your Honor, you might want to look at the list of different birds I've taken on purpose and not—

THE COURT: I am accepting that, because one of the witnesses admitted this fact, that trappers employed by the Government or acting on behalf of the Government may inadvertently capture species that are protected. I accept that as a fact. All right.

THE WITNESS: Just—

THE COURT: I don't need those documents beyond that. Anything else?

THE WITNESS: Just—I don't know if it is or not.

THE COURT: What is it? Just describe it. Stay behind the bench.

THE WITNESS: Conservation afford the defendant to (indiscernible) conservation management. This just states that I have more Red-tailed Hawks, I have more wildlife than anybody else probably on the Eastern Shore because of all the work I'm doing. And if I caught two, it was by accident. And if I caught two by accident, I'm making a home for a lot more.

THE COURT: I'll look at it quickly.

All right. This is dated 1997, Eastern Shore soil and Water Conservation District, wildlife conservationist award presented to Steve Vankesteren for outstanding accomplishments in wildlife conservation and management. It is not directly relevant at this stage of the proceedings, and so I will not consider it in connection with any evaluation of the evidence.

I'm going to return this—excuse me, return this letter to you. It is an envelope in which your permit apparently came.

All right. That's your case. You're finished; is that right?

MR. VANKESTEREN: Yes, sir.

THE COURT: All right. Have a seat.

(Witness excused.)

THE COURT: Ms. Sterling, any other evidence?

MS. STERLING: No, Your Honor.

THE COURT: I'll hear your argument. Is intent an element of this charge?

MS. STERLING: The taking is knowing and intentional.

THE COURT: It is knowing and intentional. All right. And is there any recognized defense involving inadvertence?

MS. STERLING: No, Your Honor. Well, let me say [132] this.

THE COURT: Yeah.

MS. STERLING: The Government's view of the evidence is there was no inadvertence, and for a number of reasons. First, let me make this comment. It is very curious to the Government that Mr. Vankesteren wants to present the Court with this permit to kill by rightful Red-tailed Hawks. He spent this entire proceeding telling the Court he wasn't trapping for hawks, he would never kill a hawk, and now he's getting a permit to kill hawks on his property.

So, but having said that, it's clear from his own testimony that he knows he can't kill Red-tailed Hawks. He knows it. He's using a trap that attracts birds in addition to mammals. And if he didn't know that beforehand—when he found that hawk, which he knew was a hawk on the first occasion in January, he knew that that trap was attracting and catching Red-tailed Hawks. He didn't do the responsible thing of reporting it.

If it had truly been an accident like the dogs that he had caught in the traps, he could have reported it. He could have done something. He's very familiar with the game wardens. He could have called them. And, again, he, by his own testimony, is very familiar with the fact that these are migratory birds, and in Virginia and under federal law you are not allowed to take them by trapping, killing, shooting [133] or otherwise.

So there isn't any inadvertence here. The trap was set up. The trap was designed so it might attract birds as well as mammals. If there was any doubt at all that he didn't—as to whether or not this trap was going to catch a Red-tailed Hawk or another migratory bird, once that first occasion occurred on the 11th of January, then he knew. So what did he do? He didn't call the game wardens. He reset the traps, and lo and behold, on the 20th, he gets himself another Red-tailed Hawk.

The Government also thinks it's very telling that when Mr. Vankesteren is approached by the game wardens again, with whom he's very familiar, and the federal officer, his response is not apologetic. He is not remorseful. It is, well, you know, this is my property, and I'm trapping animals, and, you know, so I got these, and you should look the other way.

It just doesn't appear from the Government that there is any question that he knew it definitely, by the last one, that what he was doing was trapping a bird that he was not allowed to trap without the permit.

And, again, Your Honor, you know, his testimony is that he traps these birds, and he looks at them, and he decides that, oh, they are not going to survive, and he kills them. What Agent Garvis will tell you is that it happens all [133] the time. People do accidentally trap animals and accidentally trap birds. They notify the game warden. The game warden shows up. They work with these people. They take the bird or the animal to a vet and they determine what should be done.

This is not—to take the bird and to bludgeon it with an ax is not the response of a person who acci-

dentally trapped something he knew he shouldn't have trapped. So even as to the first instance, the Government would contend that, the conduct of Mr. Vankesteren is not consistent with someone who just had a little accident, and, you know, used the trap and inadvertently caught something.

Whether he sought to catch hawks in the first place, he knew or should have known that that trap was going to attract them. And once he did attract one, he didn't do what a person would have done if it had been an accidental trapping. And, again, he reset those traps and caught another one.

So the Government's argument is that the evidence clearly shows that there was no inadvertence or accident, that Mr. Vankesteren knew what he was doing, he caught these hawks, and he disposed of them as efficiently as he could. He had no intention of talking to the game wardens or reporting this activity to them, and that's why the game wardens were out there, to see what he was doing and to [135] determine that he was, in fact, not abiding by the federal regulations.

THE COURT: All right, sir. You want to make any statements?

MR. VANKESTEREN: There is just—she said that I spent all the time talking about I didn't went to kill hawks and then I got a permit to kill hawks. I already explained that that was only for road hawks. The general Red-tailed Hawks, I don't have any problem with. Every once in awhile, one comes in my yard and kills a chicken. And I would like to have a permit, and I got one to shoot it, which is—if was ever going to get rid of hawks entirely, that is what I would do. I would shoot them. I would have a legal permit.

Why bother trapping something that you can get a legal permit for, and that's much more efficient to walk around—a Red-tailed Hawk that just sits in a tree. I've got a long-range rifle. If I want to get rid of hawks, I would use the rifle. I wouldn't ever bother to set a trap anywhere for it. It would be a waste of time. It is a lot of work. It is a lot of work maintaining a pigeon in a trap. So if I want to get rid of hawks, I'll shoot them.

And the other thing is I did try to call the game warden. The fact that he didn't call or respond back is not my fault. When he first saw the trap, that was before I'd ever even caught a hawk. And he saw the situation, with all [136] his knowledge, If it had been me in his situation, I would have called the guy and said, look, Steve, just come and—this trap has got to change, Just do something about it. I'll teach you how to even do a proper trap for a fox.

I mean, what is a game warden? His first job is to protect the game, not to get a prosecution. So if he really wanted—if he saw I was going to catch a hawk there, he should have called me up and said, you're going to catch a hawk. You haven't caught one yet. I'll show you how to do this right, forget about the pigeon, and then we would have saved the two hawks. He would have probably taught me—I don't doubt that he knows a lot more about that than I do. believe it would save the hawks, and we wouldn't have had to done any of this today. We wouldn't have had all this time here today. That, to me, if I'd been the game warden, that's what I would have done with his kind of knowledge, instead of just all he wants to do is get a conviction on me. I don't understand—quite understand all that.

That is all I have to say. Thank you.

THE COURT: All right, sir. Thank you. Any rebuttal?

MS. STERLING: Your Honor, Mr. Garvis, and the Virginia Department of Game and Inland Fishery had information that there was criminal activity going on in that there was a protected bird that was trapped. It's his job to [137] investigate. It is not his job to—only to educate, although he indicated he had attended trapper association meetings. But in his capacity as a law enforcement officer, his job was to go out there and investigate the complaint that they had received, and that's exactly what he did.

THE COURT: All right.

MR. VANKESTEREN: Can I comment to that?

THE COURT: No, sir. The fact is that you get a closing statement, You got it. She gets to rebut because, that is, the Government's attorney does, because they have the burden of proof, and in the usual practice, once you've made your statement, you're foreclosed. You don't get to respond.

Hers was very succinct in rebuttal. She only addressed the one point you raised regarding the intentions of agent—the actions and intentions of Agent Garvis, and it seems to the Court that there is no reason to reopen under these circumstances to allow you to rebut that very narrow rebuttal. That is not called for under the rules, and I decline to take further time in this case to do that.

I note that we have been taking testimony here since around 11, and we are at 2:15, And other matters are pressing the Court at this time.

I do want to take the time to rule from the bench as to the Court's disposition here. I have considered all

of [138] the evidence. I've looked at these photographs. I've looked at this tape. I have looked at the aerial photographs. I've looked at the traps that are set out in the tapes. I've looked at this particular trap, and I have considered it carefully.

Let me just say that I do not find a Fourth Amendment violation here. My first ruling is that there is no reasonable expectation of privacy under these circumstances. I deferred my ruling because I wanted to see the videotape. I wanted to see the circumstances under which the camera was installed, and I wanted to see the nature of the premises.

And based on my review of the videotape, and in particular my view of the aerial photographs, this is clearly an open field. This trap was at the side of an open field next to a hedgerow. The camera is apparently in the hedgerow looking out into the field. And to the degree that this camera caught any images, the field of view was 12 feet by 12 feet, according to the testimony. It did not includes anything that might create any reasonable expectation of privacy. There are no buildings in it. There are no other--aspects of the field of view of the camera that would justify a claim on the part of this defendant that he had an expectation of privacy that was in any way reasonable.

It is not—it does not include a home or [139] curtilage. It is an open field. In fact, one of the—part of the video shows a flock of turkeys walking through the field of view, which gives you some idea of how remote it is from any sort of habitation that is human in nature.

The Court relies on the cases that the defendant—that the Government has provided here. It seems to

the Court that the *Hester* decision, *U.S. versus Hester*, 265 U.S. 57, a 1924 case, which establishes the open field doctrine, and the cases that follow *Hester*, *Oliver versus United States* at 466 U.S. 1970, a 1984 case; *U.S. versus Dunn* at 480 U.S. 294, a 1987 case, all are on point in supporting this notion that under these specific circumstances there was no reasonable expectation of privacy, and the officers implanting the camera, which they have apparently done on numerous occasions in other circumstances, did not invade anyone's privacy.

To the extent that the Court considers other cases, *Dow Chemical Company versus U.S.* at 476 U.S. 227, a 1986 case, which approves technology including aerial surveillance, and *U.S. versus McIver* at 186 F.3d 119, a Ninth Circuit case, 1999, which deals with a national forest but excuses the use by law enforcement of a camera under those circumstances, is also entirely appropriate. And the Court also notes, *U.S. versus Katz* at 389 U.S. 347, a 1967 case which holds that where a person knowingly discloses to the public, even in his house or office, or what a person [140] knowingly exposes to the public, even in the house or in an office, is not the subject of Fourth Amendment protection.

There is, after all, a plain view exception to the Fourth Amendment, and all of this was clearly within plain view, and there's certainly no other interest being served by these law enforcement officers, acting clearly in good faith, other than to surveil the area around the suspicious trap.

So having said that there was no violation, the Court then concludes that the defendant is guilty of both charges, and the Court finds this—these facts beyond a reasonable doubt. The Court concludes that

these are knowing violations. The Court believes that the defendant's intention in fashioning this particular kind of trap, and the Court is relying especially on the testimony of Agent Garvis here, as well as the obvious appearance of the trap, that it was the defendant's intention to trap without discrimination, including migratory birds.

In this particular case the Court listened carefully to the testimony of Agent Garvis, who is an admitted expert in this matter. Agent Garvis testified regarding this matter, clearly and efficiently, and the Court places a great deal of reliance on his testimony. The Court also notes that this trap is indiscriminate in the extreme. You can walk through this area, and one of the several traps right on the ground can—an animal can walk through the area, and any [141] one of the traps around the cage ran snare hit and trap an animal.

There is a similar kind of trap on top of the cage, which I will call a chicken wire cage, although that is not entirely accurate. So there are four around the cage, and then there is one on top of the cage. And then there are these—a dead pigeon and a live pigeon, both of whom are visible from above, which suggests to the Court that this trap was intended to trap, without discrimination, mammals and migratory birds.

The Court notes that the defendant dispatched the birds without regard to whether or not they might survive. This is done without any pause or hesitation, based on the Court's view of the videotape, with a seeming lack of concern, although there were clearly alternatives for one who might be concerned that he made a mistake.

And to the extent that the defendant might argue inadvertence, the Court notes that the first bird was

killed on the 17th. The defendant reset the traps, and I've seen that action in the videotape, and found that he did, in fact, reset the traps following the 17th. He caught another bird on the 20th. He set the traps again.

The defendant may have rendered the trap ineffective on or after the 24th., and there is some conflicting evidence as to one particular trap that remained open. But when you [142] catch a Red-tailed Hawk and you know you shouldn't, you kill it on the spot without any compunction, and then you reset your traps, you catch another one, you kill that one without compunction, and you reset the traps again, and then you go out and get a permit to kill Red-tailed Hawks with a shotgun, the defendant has no credibility with this Court with regard to his intentions. He was not trying to discriminate. He was trying to kill birds, this particular bird. The killing of these birds was unlawful.

Now, with regard to what's appropriate here as a disposition—you want to come up to the podium, sir.

MR. VANKESTEREN: Yes, sir.

THE COURT: I have noted and will take into account now the plaque that you got in 1997 that suggests that you are a conservationist. Anything else you want to say?

MR. VANKESTEREN: Well, the only thing I can say is that maybe—I admit I killed the two hawks, but I have done more for wildlife on the Eastern Shore than just about anybody else, including hawks. With those hedgerows that you see in that picture, if it wasn't for me, they would have been cleared off 20 years ago. I rented the farm so I could save the hed-

gerow. Somebody else was getting ready to bulldoze them off.

So there is no—anybody knows anything at all about wildlife management, knows that habitat is the key to [143] animals. In other words, you can kill two Red-tailed Hawks, and you leave the habitat for them, and naturally you'll produce ten, which they do nest in my property. That is true of any kind of wildlife. It really doesn't—it doesn't have any overall effect. But if you take all the hedgerows away from the hawks, all the habitat away from them like a developer or like a lot of farmers in my area do, and they are clearing hedgerows, opening up fields, then there is no habitat, not only for hawks, it's not for anything, any other animals.

So I would like to see—I'd like to see the Court take that into account that I have really, for every hawk I've killed, I've produced probably 50 through the years, if you count, go back 50 years or however long I've been farming. And it's—to me it doesn't—I mean, if you know wildlife management, it is not taking the animals that counts. It's taking the habitat away.

The old story about, you know, you prosecute the guy—the guy who takes the goose from the—that was an old English saying—the guy who takes the goose from the common, he's sent to jail because he took a goose, but the guy who took the common from the goose, which is a developer is looked on in the community as a great guy, nothing's ever done to him. He's the pillar of the community because he has cleared off land. He's made land for houses, and things like [144] that, And there really—he's the one that's hurt the goose, not the guy who took one goose

from him because he left the common so there's room for another hundred geese to come in.

So I think it only fair that you take that into account in what I've done. As all this land around me is being developed—I don't know if you know it, but the Eastern Shore is rapidly being developed. There's home projects. Farms are being cleared for—large-scaled farms are being—all the hedgerows are being cleared for tomatoes and things like that.

So when I left my area, I've planted where I've increased hedgerows. I've planted more for wildlife and everything. So as they clear the property, things like Red-tailed Hawks that are mobile actually move into my property as a haven.

So I've actually created a haven for them. You may say that I'm mean to hawks or something like that, but same thing, I go duck hunting, I shoot ducks, but I've made wetlands. Is that being mean to a duck by making a wetland for them so I shoot ten ducks and make a home for a thousand ducks?

I don't think that's being unreasonable.

THE COURT: Anything else, sir?

MR. VANKESTEREN: That's it, I guess. Thank you.

THE COURT: All right. Stand there, please. This [145] Court is going to pronounce a sentence that the Court believes will be sufficient under the circumstances. Is there any record or anything else the Court needs to consider here?

MS. STERLING: No, Your Honor. I would just let the Court know that the Commonwealth of Virginia does publish a replacement schedule, and that in addition to any fines or fine imposed for unlawfully

killing any of these listed animals and birds, there is also a replacement value that can be assessed. And replacement value of the Red-tailed Hawk is five hundred dollars.

THE COURT: And is it—you believe its within the Court's authority to order a replacement value here?

MS. STERLING: Yes, sir. It is authorized by the Commonwealth of Virginia. It goes to—

THE COURT: It is not mandatory with this Court?

MS. STERLING: No, it is not mandatory.

THE COURT: That is all I needed to hear.

MS. STERLING: And I think the collateral for the offense is $500, Your Honor.

THE COURT: Thank you.

MS. STERLING: Yes, sir.

THE COURT: All right. Let me make sure you're clear. Now, I've listened to you carefully throughout this entire case.

[146] MR. VANKESTEREN: Yes, sir.

THE COURT: I have tried to guide you within the framework of procedure, but I've listened to just about everything you've had to say.

MR. VANKESTEREN: Yes, sir.

THE COURT: And I have considered the evidence carefully. And I have—I'm only looking at the two sections of the tape that deal with events on the 17th and the 20th or up to that point. You made some mention of a portion of the tape from beyond that that you thought should be looked at, but there was nothing that the Government said occurred during

that time that involved your appearance. So I didn't consider any of that relevant. I still don't. But the fact of the matter is I've looked at this carefully, and I have ascribed a motive to your actions, and you may disagree with me, and but I have formed that opinion carefully based on the information that is before me.

This is not a question—the only question here is whether you knowingly killed a bird identified on the appropriate schedule or within the regulations. It is not about who's mean to wildlife. There is in all of this a streak of I've done some good so I should be let off, and the fact of the matter is, as far as this Court's concerned, I'll accept your representations that you're a conservationist. But I also have to conclude, based on what I've seen on the [147] tapes here, that you dispatched these two birds knowing that you were trapping them in the first place and without any compunction. And that's got to count, too.

Accordingly, it's the order of the Court that you pay on each count a $500 fine and a $10 special assessment. The Court does not order any sort of replacement, and that's the nature of the disposition. You'll see the clerk and determine—make arrangements to pay your fines. You may appeal this decision in ten days in writing. That is the disposition of the Court. Is there anything else?

MS. STERLING: Your Honor, there is also a $25 fine on each.

THE COURT: $25 processing fee on each count. Thank you for reminding me of that. So that's—that'll all be paid by the defendant.

I am returning the exhibits to the Government at this time for maintenance in the event of an appeal.

If there is nothing further—

MS. STERLING: Nothing further from the Government, Your Honor.

THE COURT: This Court stands in recess.

(Hearing adjourned at 2:37 p.m.)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: January 8, 2009]

No. 08-4110
(2:07-cr-00153-RBS-1)

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

STEVE VANKESTEREN,
Defendant-Appellant

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed: January 30, 2009]

No. 08-4110
(2:07-cr-00153-RBS-1)

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

STEVE VANKESTEREN,
Defendant-Appellant

MANDATE

The judgment of this Court, entered 1/8/09, takes effect today.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Criminal Action No. 2:07cr153

UNITED STATES OF AMERICA,
Plaintiff,

v.

STEVE VANKESTEREN,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Before: The Honorable REBECCA BEACH SMITH
United States District Judge

[2] THE CLERK: Case number 2:07cr153, United States versus Steve Vankesteren.

Ms. Sterling, is the Government ready to proceed?

THE CLERK: Case number 2:07cr153, United States of America versus Steve Vankesteren.

Ms. Sterling, is the government ready to proceed?

MS. STERLING: The government is ready, Your Honor.

THE CLERK: Mr. Broccoletti, is the defendant ready to proceed?

MR. BROCCOLETTI: Good afternoon, Your Honor. Present and ready.

THE COURT: I believe, Mr. Broccoletti, that you represent the appellant. I have reviewed the record, and you may go forward with your argument.

MR. BROCCOLETTI: Judge, we have submitted a brief to the court which I'm sure the court has carefully considered. I would be glad to answer any particular questions regarding that brief or the matters that have been brought to the court's attention.

Two issues primarily we have raised before the court, that dealing with the suppression issue as to whether or not a warrant was required at the time the officers installed this video camera. We understand the issues of open field doctrine, *Hester* and *Oliver* and the curtilage. I think this case goes a little bit farther than that, however, because of the installation of the video camera. We had not found any reported cases dealing with the installation of a video camera on private property. I know the government has [3] cited a Ninth Circuit case, but I think that is clearly distinguishable, because that case deals with the installation of a camera on public lands, which I think takes it out of the analysis that is before the court for this particular case today.

I think the video camera installation, as well as the continued entrances on the property by the officers—as the court knows from reading the record and review of the transcript, the officers went initially upon the property because of a phone call. There was no information that was provided to the court as to the reliability of that phone call, the source of that information of that individual.

The information that was provided to the officers at that time was that there was a bird that was suffering in a cage, and possibly a protected bird. But there

was insufficient evidence, we believe, for the officers to even make the initial entry upon the land, based upon the paucity of information that was provided to them through this phone call, which was not corroborated, was not verified, no information about the reliability of it in any shape or form.

The officers made continued entrances onto the property after that. If the court recalls from the evidence, the first entrance onto the property yielded the officers' not finding anything of a criminal nature. They found the cages, they found that there was a pigeon, they found that there was [4] some blood, but they didn't see any migratory birds, they didn't see evidence of any types of criminal conduct.

Notwithstanding the absence of any evidence of any criminal conduct, the officers continued to go upon the property on a number of different occasions before the officers finally decided to install the video camera. It is our position that those continued entrances on the property, as well as the installation of the camera, take this into a different realm, if you will, into a more serious concern where a warrant should have been obtained.

The second issue with respect to the proof beyond a reasonable doubt deals primarily with the first offense on January 17. On that offense, the defendant was charged with on that particular day taking—

THE COURT: Slow down a little bit, Mr. Broccoletti. Go ahead. January 17.

MR. BROCCOLETTI: I'm sorry. Yes, ma'am.

On January 17 the defendant was charged with the taking of the red-tailed hawk. And if the court recalls from the evidence, the evidence was in equipoise, if

you will. The officer was not certain, certainly not evidence beyond a reasonable doubt, as to the identity of that bird.

He described the bird as being one of three types of birds, and he opined that those three birds were also included within the Migratory Bird Act, but the defendant wasn't [5] charged with the other two. He was charged with this particular bird, this red-tailed hawk.

So it is our position that the evidence fails as proof beyond a reasonable doubt, based upon the charge that the defendant was facing and the evidence that was insufficient that was adduced against him.

THE COURT: All right. Ms. Sterling?

MS. STERLING: Your Honor, as the government has pointed out in the brief, there are a long line of Supreme Court cases that address the open fields doctrine, and clearly based upon the facts of this case, the magistrate judge did not err when he found that this video camera was placed in an area that could be and that was in fact in open fields.

What the open fields doctrine stands for is the fact that if an activity is being conducted in an open field, that is, outside of the home or the cartilage of the home, but a place where one would not reasonably expect privacy and a place where society does not deem there is a reasonable expectation of privacy, then there simply is no Fourth Amendment issue.

In open field cases law enforcement officers are entitled to and regularly do go upon property to conduct their investigations. What this line of cases tells us, particularly the case of *Oliver*, is that is true even if what the officers are doing constitutes a trespass.

They are not [6] related. In fact, the game wardens, the state game wardens who initiated this investigation, routinely go on private property, and that's something that the defendant acknowledged during the course of the trial. That's part of their duties. They investigate hunting violations. They are within their rights and their duties to go onto private property.

So what the cases are saying, as far as the open fields, is that if you have an open fields case, the officers are entitled to search. No warrant is required, period. Period. There is no argument here that this is anything other than an open field. The case of *Dunn* sets forth the criteria of determining whether this is a curtilage case.

THE COURT: Assuming it is an open field for a moment, assuming that you are right in that regard, can you still go onto somebody's private property and install a video camera?

Mr. Broccoletti is right, the case that you cited, the video was on public property. Can you go onto somebody's property and say, well, we have got some information, we can't catch you in the act, we haven't been able to walk there and see and catch you in the act, so we are just going to keep it rolling for 24 hours to see if we find something?

What if it doesn't involve migratory birds? What if it is a drug investigation? Are the agents entitled to—with technology today, you could easily get away from the [7] curtilage of a house. You can install a camera—say, someone loves their privacy, and they live on four acres of land. That's their land, they are there because they love their privacy, and they expect to have privacy there. But the officers say, well, wait just a minute, this is really an open land, it is an

open field, this person is surrounded by fields, and we have got this high-tech video equipment that we can put on the property and zoom in to monitor everything that is going on in this house.

MS. STERLING: They absolutely can't monitor anything that goes on in the house, and that is the distinction. What the cases talk about, if you go back to *Katz,* which was the case where there was essentially a bug put in a phone booth, what the Supreme Court said is that, yes, this is a public place, but, no, the government can't do this without a warrant, because what the Fourth Amendment protects are people, their houses, their papers, and their effects. It really doesn't address property issues.

But in the way that the court has interpreted the Fourth Amendment, it has always been very clear since *Hester,* which was the original case, that a person's home and the area immediately surrounding the home, which is the curtilage, is absolutely protected, and that officers cannot intrude upon that without the benefit of a warrant.

But we are not talking about that. What we are [8] talking about is an area that is not—we are not talking about looking into someone's home. We are talking about what is really an area, an open field, and *Oliver* talks about an open field. It is simply an area where one would not expect someone to conduct the regular intimate activities of their life. It is not, for example—and in *Oliver* the example was the Fourth Amendment does not protect the cultivation of fields.

The testimony by Mr. Vankesteren in this case is that the area in question is where he conducted his farming. *Oliver* says that is not protected. The Fourth

Amendment does not protect any activities that occur in the open field, and the officers are entitled to go in, and they can in fact use a video camera. And there are several cases that deal with whether law enforcement officers can use technology to enhance their five senses in their surveillance.

THE COURT: I think they can use technology to enhance their senses in their surveillance. But it becomes a different issue—when you talk about invasion of privacy, there is that "into" portion of it, and how far can you go into somebody's private property to install a video camera or enhanced equipment? In other words, I think that's the issue.

There is no question if you are standing on a public street, and somebody is in a building across the street, and they haven't made the appropriate arrangements for privacy by [9] pulling their curtains or whatever, you can do whatever you want to look in and enhance your view, because they haven't created that expectation of privacy.

But the concern here is not the walking on so much as the installation of a continuous-running video camera.

MS. STERLING: The case law says that in an open field there simply is no expectation of privacy that society is willing to protect, that the Fourth Amendment does not apply. There is no requirement of a warrant when you are talking about an open field.

And when you read the cases, what you find, too, is that there is no distinction between public and private property. What the court looks at is the activity that is involved. As, for example, I said in *Katz,* when you are talking in a phone booth, there is a reasonable expectation that you will be able to have this con-

versation without people listening, and that presumably is why you step into a phone booth in the first place. It doesn't matter that that is a public place. It also doesn't matter that it is a private place. It is the activity that is protected, and that's what the Fourth Amendment addresses.

In the *McIver* court it did occur on public land, but one of the things the court said is that doesn't mean just because it is public land that we can set up video surveillance, because clearly there are areas within the park [10] where we cannot. There are areas where people are camping and doing other such things that are private in nature and for which they reasonably expect privacy, and it is a privacy that society recognizes.

And that's really what the test is. It does not really involve a distinction between private and public. The Fourth Amendment, what the case law tells you, too, was not really concerned with property, real property interests *per se,* and that's the reason it was drafted listing people, houses, papers, and effects. There was no mention of property. It is not a property interest, it is a privacy interest.

Again, Your Honor, based on a reading of all the Supreme Court cases, it is very clear that there just is no reasonable expectation of privacy in an open field, and therefore there is no Fourth Amendment problem when the officers come on to conduct an investigation.

Going beyond that, once they are entitled to be there, as they would be to conduct a surveillance—they could have stood there for days and watched what was going on. If they are entitled to do that, they are also entitled to use technology. And that's

what the cases are saying. That's what was said in *McIver*. That's what the Supreme Court said in *Dow Chemical* when they talked about aerial surveillance.

Now, they do say there could come a point where [11] technology is so sophisticated that maybe a problem would arise. But not just flying over, regular aerial surveillance—that doesn't pose a problem, and this sort of thing doesn't pose a problem, because the officers are looking at something they would have been entitled to look at if they had chosen just to stand there and conduct their own surveillance. There is nothing that would indicate a need for a search warrant, because there is just no Fourth Amendment right to privacy in this particular area, and that's what the original issue comes down to.

THE COURT: What about Mr. Broccoletti's argument about a reliable source? Can officers just take phone calls from unknown individuals and then just start going onto people's property or observing or whatever? I mean, I know there were some things that transpired after that.

MS. STERLING: This wasn't brought up in the brief, so I apologize, because I didn't really have this well prepared. But the information the officer received was specific enough, indicating a location, describing a kind of trap, describing a bird within the trap, and what the caller described as what they thought was a protected bird in distress, and the officer is entitled to go out to investigate, and once he did, what he discovered was that everything that the caller had told him was true, insofar as his—not of the bird that was in the trap, but the [12] observation of what was described, as far as the trap itself with the live pigeon on the inside.

And as I said before, and defendant himself admitted at trial, this is what the game wardens do. They are routinely patrolling private property because their mission is to prevent acts involving migratory birds and other game and wildlife, and in order to accomplish their law enforcement duties, that's where they are. It obviously doesn't just occur on public lands.

So I think that the officer did have sufficient information to allow him to go out there and investigate, and once he had information that would corroborate what he observed, he had some reason to investigate further.

And as the court had indicated, one of the things that the officer testified to is that this was a very, very unusual type of trap. The only time he had ever seen it before was a couple of years prior, and he saw that type of trap on property owned by the same defendant. So he had some of his own knowledge and concerns which caused him to believe that an investigation was warranted.

So we don't believe there was any problem with him going onto the property or conducting the investigation.

THE COURT: Mr. Broccoletti, let me ask you a couple of questions.

MR. BROCCOLETTI: Yes, ma'am.

[13] THE COURT: In terms of the various issues that you have raised on appeal, you claim that the government failed to prove that both birds were red-tailed hawks.

MR. BROCCOLETTI: Yes, ma'am.

THE COURT: Can you expand on that a little bit?

MR. BROCCOLETTI: Yes, ma'am.

As I indicated earlier, the defendant was charged on January 17 with the taking of that bird or the killing of that bird. The officer's testimony was that it was one of three birds. He could not tell with any specificity or certainty which type of bird that it was that is depicted on the videotape. He had some descriptions of the bird, but was unsure as to whether it was a red-tail or two others. He testified that the other two birds were also covered under the migratory act.

But when a defendant is charged with a specific violation of taking a specific bird, and the officer is not able to say beyond a reasonable doubt, or the trial court should not be able to find beyond a reasonable doubt that the evidence is sufficient to establish that it is that bird, then I think that the evidence fails and that warrant should have been dismissed against him.

THE COURT: All right. Your second argument was that they failed to prove that the red-tailed hawk is a migratory bird.

[14]MR. BROCCOLETTI: It is a migratory bird. He did not testify, but it is covered under the CFRs.

THE COURT: All right. And a judge should be able to take judicial notice of that.

MR. BROCCOLETTI: Yes, ma'am.

THE COURT: So that argument really is not a particularly strong argument.

MR. BROCCOLETTI: Not at issue, no, ma'am.

THE COURT: And then that they failed to prove his actions were knowing and intentional—well, it is a strict liability situation. Do you agree?

MR. BROCCOLETTI: I do.

THE COURT: All right. I just wanted to be clear. Basically the two issues before the court are the motion to suppress and whether they could go onto the private property and install a video camera and proceed with the investigation the way they did without a warrant.

MR. BROCCOLETTI: Yes, ma'am.

THE COURT: And the second is whether their evidence meets the burden of proof in regard to the charges that were brought.

MR. BROCCOLETTI: The first charge, yes, ma'am.

THE COURT: Is there anything else you want to add to your arguments in your briefs or respond to Ms. Sterling?

MR. BROCCOLETTI: No, ma'am.

[15] (Pause)

THE COURT: All right. Counsel, I will go back and review your arguments again, and I will issue an opinion.

I don't like the installation of a video camera on somebody's property, I just have to tell you. I'm not sure that I can find that the place is protected, that there is a reasonable expectation of privacy under the law, because the law is fairly settled in that area. It is just that I don't like the installation of a video camera on somebody's private property. But that doesn't mean that it is protected by the Fourth Amendment or that it was not a permissible act. I will go back and review all of that again, and I will also look at your argument regarding the burden of proof.

I will say that Judge Stillman did a very thorough job below, and I think that Mr. Vankesteren did a good job of representing himself, although it is probably always better to have an attorney in these situations—sometimes a lesson well learned, and we move on.

But in any event, I will go back and look at everything again and issue an opinion, and I will take it under advisement.

The court stands in recess.

(Proceedings were concluded at 2:28 p.m.)

APPENDIX F

U.S. Fish and Wildlife Service
United States District Court
Violation Notice

CVB Location Code: VA32

W0784083

Violation Number	Officer Name (Print)	Officer No
W0784083	DANIEL ROLINCE	SA0628

YOU ARE CHARGED WITH THE FOLLOWING VIOLATION

Date and Time of Offense (mm/dd/yyyy)	Offense Charged ☒ CFR ☐ USC ☐ State Code
03/17/2007	16 U S C 703, 50 C F R 21 13

Place of Offense: ACCOMACK COUNTY, VIRGINIA

Offense Description: Did take or possess a migratory bird without a permit, to wit a red-tailed hawk

DEFENDANT INFORMATION Phone: [redacted]

Last Name	First Name	MI
VANKESTEREN	STEVEN	C

Street Address: [redacted]

City	State	Zip Code	Date of Birth (mm/dd/yyyy)
ONANCOCK	VA	23417	[redacted].947

Driver's License No	DL State	Social Security No
		[redacted]1647

☒ Adult ☐ Juvenile	Sex ☒ Male ☐ Female	Hair	Eyes	Height	Weight
		BRO	BRO	510	180

VEHICLE DESCRIPTION VIN

Tag No	State	Year	Make/Model	Color
				UNK

A ☒ IF BOX A IS CHECKED, YOU MUST APPEAR IN COURT SEE INSTRUCTIONS (on back of yellow copy)

B ☐ IF BOX B IS CHECKED, YOU MUST PAY AMOUNT INDICATED BELOW OR APPEAR IN COURT SEE INSTRUCTIONS (on back of yellow copy)

$ _____ Forfeiture Amount
+ $25 Processing Fee
PAY THIS AMOUNT → $ Total Collateral Due

YOUR COURT DATE

(If no court appearance date is shown you will be notified of your appearance date by mail.)

Court Address	Date (mm/dd/yyyy)
U S MAGISTRATE JUDGE WALTER E HOFFMAN COURTHOUSE 600 GRANBY STREET NORFOLK, VA 23510	08/07/2007
	Time (hh:mm)
	11 00 AM

My signature signifies that I have received a copy of this violation notice. It is not an admission of guilt. I promise to appear for the hearing at the time and place instructed or pay the total collateral due.

X Defendant Signature _____

BEST AVAILABLE COPY

STATEMENT OF PROBABLE CAUSE
(For issuance of an arrest warrant or summons)

I state that on January 20, 20 07 while exercising my duties as a law enforcement officer in the EASTERN District of VIRGINIA

The foregoing statement is based upon

- ☐ my personal observation
- ☐ my personal investigation
- ☐ information supplied to me from my fellow officer's observation
- ☐ other (explain above)

I declare under penalty of perjury that the information which I have set forth above and on the face of this violation notice is true and correct to the best of my knowledge

Executed on _____
Date (mm/dd/yyyy) Officer's Signature

Probable cause has been stated for the issuance of a warrant

Executed on _____ _____
Date (mm/dd/yyyy) U S Magistrate Judge

CVB Scan 5/24/2007 14 24 43

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk / Newport News Divisions
ACKNOWLEDGMENT OF FINES AND ASSESSMENTS / PROBATION NOTICE

Vankesteren Steven C.
Last Name First M.

CASE NO. OR VIOL. NO. W0784083 ; W0784084

MAGISTRATE JUDGE ( ) TEM (X) FBS ( ) JEB ( ) WTP

I hereby acknowledge that I have been sentenced to pay the following fine(s), assessment(s) & processing fee(s):

CHARGES:	(1) Possess Migratory Bird W/out Permit	(2) Possess Migratory Bird W/out Permit	(3)	(4)	(5)
GUILTY:	(1)	(2)	(3)	(4)	(5)
FINES:	$ 500	$ 500	$	$	$
ASSESSMENTS:	$ 10	$ 10	$	$	$
PROCESSING FEE:	$ 25	$ 25	$	$	$
TOTALS:	$ 535	$ 535	$	$	$
	CVB/COURTS	CVB/COURTS	CVB/COURTS	CVB/COURTS	CVB/COURTS

TOTAL AMOUNT DUE: $ 1070 DATE DUE: 9/7/07

THE CLERK'S OFFICE IS NOT AUTHORIZED TO EXTEND TIME TO PAY FINE BEYOND THE DATE DUE

Make check or money order payable to: CLERK, U.S. DISTRICT COURT and mail to the following address:

Central Violations Bureau
P.O. Box 70939
Charlotte, North Carolina 28272-0939

___ Clerk, U. S. District Court
600 Granby Street
Norfolk, Virginia 23510

___ Clerk, U. S. District Court
P.O. Box 494
Newport News, Virginia 23607

I acknowledge that (a) penalties and interest may accrue on my fine(s) if not paid when due; (b) any unpaid federal fine is a lien against my real and personal property; (c) if I knowingly fail to pay my fine(s), the Court can increase the fine(s) pursuant to Title 18 USC 3614(a); (d) willful failure to pay a Federal fine is a crime, punishable by imprisonment for one year, a fine of up to $10,000.00, or both, pursuant to Title 18 USC 3615.

I hereby certify that this notice was read and understood by me and that a copy of this notice was given to me.

Witnessed: Fernando Galindo, Acting Clerk

Steve Van Kesteren 8/7/07
Defendant Date

By: _____
Deputy Clerk

PROBATION: Supervised - _____ Limited Supervised - _____ BAC: _____

JAIL SENTENCE: _____

___ Defendant's driving privileges within the special maritime and territorial jurisdiction of the United States are suspended for a period of ONE (1) YEAR.

SPECIAL CONDITIONS OF PROBATION

___ Defendant is prohibited from operating a motor vehicle on a public highway for a period of
___ Deft. is directed to participate in an alcohol education/treatment and/or mental health program as directed by the Probation Office.
___ Deft. shall pay fine/special assessment _____ immediately; _____ w/in the first _____ months of probation.
___ Deft. is directed to surrender his/her operator's license to the Division of Motor Vehicles within thirty (30) days.
___ Restricted license as directed by the Probation Office.
___ Deft. is directed to serve _____ in jail as directed by the Probation Office.
___ Deft. is directed to participate in a theft prevention seminar, to be paid for at their own expense, as directed by the Probation Office.
___ Deft. is directed to make restitution in the amount of $_____ to be paid to _____
___ _____
___ _____
___ Presentence Report ORDERED - SENTENCING SET FOR: _____

DEFENDANT - PLEASE REPORT TO THE PROBATION OFFICE IMMEDIATELY

152a

APPENDIX G

SUBCHAPTER II-MIGRATORY BIRD TREATY

§ 703. Taking, killing, or possessing migratory birds unlawful

(a) In general

Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936; the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972[1] and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of

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[1] So in original. Probably should be followed by a comma.

migratory birds and their environments concluded November 19, 1976.

(b) Limitation on application to introduced species

(1) In general

This subchapter applies only to migratory bird species that are native to the United States or its territories.

(2) Native to the United States defined

(A) In general

Subject to subparagraph (B), in this subsection the term "native to the United States or its territories" means occurring in the United States or its territories as the result of natural biological or ecological processes.

(B) Treatment of introduced species

For purposes of paragraph (1), a migratory bird species that occurs in the United States or its territories solely as a result of intentional or unintentional human-assisted introduction shall not be considered native to the United States or its territories unless

(i) it was native to the United States or its territories and extant in 1918;

(ii) it was extirpated after 1918 throughout its range in the United States and its territories; and

(iii) after such extirpation, it was reintroduced in the United States or its territories as a part of a program carried out by a Federal agency.

(July 3, 1918, ch. 128, §2, 40 Stat. 755; June 20, 1936, ch. 634, §3, 49 Stat. 1556; Pub. L. 93-300, §1, June 1, 1974, 88 Stat. 190; Pub. L. 101-233, §15, Dec. 13, 1989, 103 Stat. 1977; Pub. L. 108-447, div. E, title 1, §143(b), Dec. 8, 2004, 118 Stat. 3071.)

AMENDMENTS

2004—Pub. L. 108-447 designated existing provisions as subsec. (a), inserted heading, and added subsec. (b).

1989—Pub, L. 103-213 struck out "and" after "1936," and inserted before period at end "and the convention between the United States and the Union of Soviet Socialist Republics for the conservation of migratory birds and their environments concluded November 19, 1976".

1974—Pub, L, 93-300 substituted "any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof" for "any part, nest, or egg of any such birds", and included the convention between the United States and the Government of Japan concluded March 4, 1972.

1936—Act June 20, 1936, made changes in phraseology,

EFFECTIVE DATE OF 1974 AMENDMENT

Section 3 of Pub. L. 93-300 provided that: "The amendments made by this Act [amending this section] shall take effect on the date on which the President proclaims the exchange of ratifications of the convention between the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their

environment, concluded March 4, 1972, or on the date of the enactment of this Act [June 1, 1974], whichever date is later."

EFFECTIVE DATE OF 1936 AMENDMENT

Section 1 of act June 20, 1936, in conjunction with sections 2 to 5 of that act, provided that the amendment of this section and sections 704, 706, 707, 708 and the enactment of section 709a of this title by that act, are effective as of the day on which the President shall proclaim the exchange of ratifications of the convention between the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, or on June 20, 1936, whichever date is later. Such proclamation was made on June 30, 1937.

PUBLICATION OF LIST

Pub, L. 108-447, div. E, title 1, §143(c), Dec. 8, 2004, 118 Stat. 3072, provided that:

"(1) IN GENERAL.—Not later than 90 days after the date of enactment of this section (Dec. 8, 2004), the Secretary of the Interior shall publish in the Federal Register a list of all nonnative, human-introduced bird species to which the Migratory Bird Treaty Act (16 U.S.C. 703 *et seq.*) does not apply. As necessary, the Secretary may update and publish the list of species exempted from protection of the Migratory Bird Treaty Act.

"(2) PUBLIC COMMENT.—Before publishing the list under paragraph (1), the Secretary shall provide adequate time for public comment.

"(3) EFFECT OF SECTION.—Nothing in this subsection shall delay implementation of other provisions of this section (amending this section and enacting provisions

set out as notes under this section and section 710 of this title) or amendments made by this section that exclude nonnative, human-introduced bird species from the application of the Migratory Bird Treaty Act (16 U.S.C, 703 *et seq.*),"

REALTIONSHIP OF PUB. L. 108-447 TO TREATIES

Pub. L. 108-447; div. E, title I, §143(d), Dec, 8, 2904, 118 Stat. 3072, provided that: "It is the sense of Congress that the language of this section [amending this section and enacting provisions set out as notes under this section and section 710 of this title) is consistent with the intent and 'language of the 4 bilateral treaties implemented by this section."

INCIDENTAL TAKING OF MIGRATORY BIRDS DURING MILITARY READINESS ACTIVITIES

Pub. L. 107-314, div. A, title III, §315, Dec. 2, 2002, 116 Stat. 2509, provided that:

"(a) INTERIM AUTHORITY FOR INCIDENTAL TAKINGS.—During the period described in subsection (c), section 2 of the Migratory Bird Treaty Act (16 U.S.C. 703) shall not apply to the incidental taking of a migratory bird by a member of the Armed Forces during a military readiness activity authorized by the Secretary of Defense or the Secretary of the military department concerned.

"(b) IDENTIFICATION OF MEASURES TO MINIMIZE IMPACT OF ACTIVITIES.-During- the periods described in sub-sections (0) and (d), the Secretary of Defense shall, in consultation with the Secretary of the Interior, identify measures—

"(1) to minimize and mitigate, to the extent practicable, any adverse impacts of authorized military

readiness activities on affected species of migratory birds; and

"(2) to monitor the impacts of such military readiness activities on affected species of migratory birds,

"(c) PERIOD OF APPLICATION FOR INTERIM AUTHORITY.—The period described in this subsection is the period beginning on the date of the enactment of this Act [Dec. 2, 2002] and ending on the date on which the Secretary of the Interior publishes in the Federal Register a notice that—

"(1) regulations authorizing the incidental taking of migratory birds by members of the Armed Forces have been prescribed in accordance with the requirements of subsection (d);

"(2) all legal challenges to the regulations and to the manner of their promulgation (if any) have been exhausted as provided in subsection (c); and

"(3) the regulations have taken effect,

"(d) INCIDENTAL TAKINGS AFTER INTERIM PERIOD.—(1) Not later than the expiration of the one-year period be-ginning 013 the date of the enactment of this Act, the Secretary of the Interior shall exercise the authority of that Secretary under section 3(a) of the Migratory Bird Treaty Act (16 U.S.C. 704(a)) to prescribe regulations to exempt the Armed Forces for the incidental taking of migratory birds during military readiness activities authorized by the Secretary of Defense or the Secretary of the military department concerned,

"(2) The Secretary of the Interior shall exercise authority under paragraph (1) with the concurrence of the Secretary of Defense,

"(e) LIMITATION ON JUDICIAL REVIEW.—An action seeking judicial review of regulations prescribed pursuant to this section or of the manner of their promulgation must be filed in the appropriate Federal court by not later than the expiration of the 120-day period beginning on the date on which such regulations are published in the Federal Register. 'Upon the expiration of such period and the exhaustion of any legal challenges to the regulations pursuant to any action filed in such period, there shall be no further judicial review of such regulations or of the manner of their promulgation.

"(f) MILITARY READINESS ACTIVITY.—(1) In this section the term 'military readiness activity' includes—

"(A) all training and operations of the Armed Forces that relate to combat; and

"(B) the adequate and realistic testing of military equipment, vehicles, weapons, and sensors for proper operation and suitability for combat use,

"(2) The term does not include—

"(A), the routine operation of installation operating support functions, such as administrative offices, military exchanges, commissaries, water treatment facilities, storage facilities, schools, housing, motor pools, laundries, morale, welfare, and recreation activities, shops, and mess hails;

"(B) the operation of industrial activities; or

"(C) the construction or demolition of facilities used for a purpose described in subparagraph (A) or (B)."

ARCTIC TUNDRA HABITAT EMERGENCY CONSERVATION

Pub. L. 106-108, Nov. 24, 1999, 113 Stat. 1491, provided that:

"SECTION 1. SHORT TITLE.

"This Act may be cited as the 'Arctic Tundra Habitat Emergency Conservation Act'.

"SEC. 2, FINDINGS AND PURPOSES.

"(a) FINDINGS—The Congress finds the following:

"(1) The winter index population of mid-continent light geese was 800,000 birds in 1969, while the total population of such geese is more than 5,200,000 birds today.

"(2) The population of mid-continent light geese is expanding by over 5 percent each year, and in the absence of new wildlife management actions it could grow to more than 6,800,000 breeding light geese in 3 years.

"(3) The primary reasons for this unprecedented population growth are-

"(A) the expansion of agricultural areas and the resulting abundance of cereal grain crops in the United States;

"(B) the establishment of sanctuaries along the United States flyways of migrating light geese; and

"(C) a decline in light geese harvest rates.

"(4) As a direct result of this population explosion, the Hudson Bay Lowlands Salt-Marsh ecosystem in Canada is being systematically destroyed. This eco-system contains approximately 135,000

acres of essential habitat for migrating light geese and many other avian species. Biologists have testified that one-third of this habitat has been destroyed, one-third is on the brink of devastation, and the remaining one-third is overgrazed.

"(5) The destruction of the Arctic tundra is having a severe negative impact on many avian species that breed or migrate through this habitat, including the following:

"(A) Canada Goose.

"(B) American Wigeon.

"(C) Dowitcher.

"(D) Hudsonian Godwit.

"(E) Stilt Sandpiper.

"(F) Northern Shoveler.

"(G) Red-Breasted Merganser.

"(H) Oldsquaw.

"(I) Parasitic Jaeger.

"(J) Whimbrel.

"(K) Yellow Rail.

"(6) It is essential that the current population of mid-continent light geese be reduced by 50 percent by the year 2005 to ensure that the fragile Arctic tundra is not irreversibly damaged,

"(b) PURPOSES.—The purposes of this Act are the following:

"(1) To reduce the population of mid-continent light geese.

"(2) To assure the long-term conservation of mid-continent light geese and the biological diversity of

the ecosystem upon which many North American migratory birds depend.

"SEC. 3. FORCE AND EFFECT OF RULES TO CONTROL OVERABUNDANT MID-CONTINENT LIGHT GEESE POPULATIONS.

"(a) FORCE AND EFFECT.—

"(1) IN GENERAL.—The rules published by the Service On February 16, 1999, relating to use of additional hunting methods to increase the harvest of mid-continent light geese (64 Fed. Reg, 7507-7617) and the establishment of a conservation order for the reduction of mid-continent light goose populations (64 Fed. Reg. 7517-7528), shall have the force and effect of law.

"(2) PUBLIC NOTICE.—The Secretary, acting through the Director of the Service, shall take such action as is necessary to appropriately notify the public of the force and effect of the rules referred to in paragraph (1).

"(b) APPLICATION.—Subsection (a) shall apply only during the period that—

"(1) begins on the date of the enactment of this Act [Nov. 24, 1999]; and

"(2) ends on the latest of

"(A) the effective date of rules issued by the Service after such date of the enactment to control overabundant mid-continent light geese populations;

"(B) the date of the publication of a final environmental impact statement for such rules under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)); and

"(C) May 15, 2001.

"(c) ROLE OF CONSTRUCTION—This section shall not be construed to limit the authority of the Secretary or the Service to issue rules, under another law, to regulate the taking of mid-continent light geese.

"SEC. 4. COMPREHENSIVE MANAGEMENT PLAN.

"(a) IN GENERAL.—Not later than the end of the period described in section 103(b) [probably means section 3(b)), the Secretary shall prepare, and as appropriate implement, a comprehensive, long-term plan for the management of mid-continent light geese and the conservation of their habitat.

"(b) REQUIRED ELEMENTS.—The plan shall apply principles of adaptive resource management and shall include

"(1) a description of methods for monitoring the levels of populations and the levels of harvest of mid-continent light geese, and recommendations concerning long-term harvest levels;

"(2) recommendations concerning other means for the management of mid-continent light goose populations, taking into account the reasons for the population growth specified in section 102(a)(3) [probably means section 2(a)(3)];

"(3) an assessment of, and recommendations relating to, conservation of the breeding habitat of mid-continent light geese;

"(4) an assessment of, and recommendations relating to, conservation of native species of wildlife adversely affected by the overabundance of mid-continent light geese, including the species

specified in section 102(a)(5) (probably means section 2(a)(5)j; and

"(5) an identification of methods for promoting collaboration with the Government of Canada, States, and other interested persons,

"(c) AUTHORIZATION OF APPROPRIATIONS.—There is authorized to be appropriated to carry out this section 51,000,000 for each of fiscal years 2000 through 2002,

"SEC. 5. DEFINITIONS.

"In this Act:

"(1) MID-CONTINENT LIGHT GEESE.—The term 'mid-continent light geese' means Lesser snow geese (Anser caerulescens caertilescens) and Ross' geese (Anser rossii) that primarily migrate between Canada and the States of Alabama, Arkansas, Colorado, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming.

"(2) SECRETARY.—The term 'Secretary' means the Secretary of the Interior,

"(3) SERVICE.—The term 'Service' means the United States Fish and Wildlife Service."

§704. Determination as to when and how migratory birds may be taken, killed, or possessed

(a) Subject to the provisions and in order to carry out the purposes of the conventions, referred to in section 703 of this title, the Secretary' of the Interior is authorized and directed, from time to time, having due regard to the zones of temperature and to the

distribution, abundance, economic value, breeding habits, and times and lines of migratory flight of such birds, to determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, taking, capture, killing, possession, sale, purchase, shipment, transportation, carriage, or export of any such bird, or any part, nest, or egg thereof, and to adopt suitable regulations permitting and governing the same, in accordance with such de-terminations, which regulations shall become effective when approved by the President.

(b) It shall be unlawful for any person to—

(1) take any migratory game bird by the aid of baiting, or on or over any baited area, if the person knows or reasonably should know that the area is a baited area; or

(2) place or direct the placement of bait on or adjacent to an area for the purpose of causing, inducing, or allowing any person to take or attempt to take any migratory game bird by' the aid of baiting on or over the baited area.

(July 3, 1918, ch. 128, §3, 40 Stat. 755; June 20, 1936, ch. 634, §2, 49 Stat. 1556; 1939 Reorg. Plan No. II, §4(f), elf, July 1, 1939, 4 F.R.. 2731, 53 Stat. 1433; Pub. L. 105-312, title 1, §102, Oct. 30, 1998, 112 Stat. 2956.)

AMENDMENTS

1998—Pub. L. 105-312 designated existing provisions as subsec. (a) and added subsec, (b),

1936—Act June 20, 1936, substituted "conventions" for "convention" wherever appearing.

EFFECTIVE DATE OF 1936 AMENDMENT

Section effective June 30, 1937, *see* section 1 of act of June 20, 1936, set out as a note under section 703 of this title.

TRANSFER OF FUNCTIONS

Transfer of functions of Secretary of Agriculture to Secretary of the Interior by Reorg. Plan, No. II of 1939, *see* Transfer of Functions note set out under section 701 of this title.

DELEGATION OF FUNCTIONS

For delegation to Secretary of the Interior of authority vested in President, *see* Ex. Ord. No. 10752, Feb. 12,